TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 198.

THE BOSTON AND MAINE RAILROAD, PETITIONER,

vs.

JOHN N. GOKEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 14, 1907.
CERTIORARI AND RETURN FILED FEBRUARY 26, 1907.

(20,527.)

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a United States Circuit Court of Appeals for the Second Circuit.

THE BOSTON AND MAINE RAILROAD, Plaintiff in Error (Defendant Below),

vs.

JOHN N. GOKEY, Defendant in Error (Plaintiff Below).

Transcript of Record.

Error to the Circuit Court of the United States for the District of Vermont.

Printed under the Direction of the Clerk.

[Stamped:] United States circuit court of appeals, second circuit. Filed Dec. 22, 1905. William Parkin, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the Circuit Court of the United States for the District of Vermont, Greeting:

Because of the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between John N. Gokey, of Derby, in the District of Vermont, aforesaid, plaintiff therein, against the Boston & Maine Railroad of Massachusetts, defendant therein, a manifest error hath happened, to the great damage of the said Boston & Maine Railroad, as is said and appears by its complaint.

We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, in the City of New York, together with this writ, so that you have the same at the said place, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States ought to be done.

2 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of September, in the year of our Lord one thousand nine hundred and

five, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] GEO. E. JOHNSON,
Clerk of the Circuit Court of the United States of America for the District of Vermont, in the Second Circuit.

The foregoing writ is hereby allowed, bond approved as a supersedeas and citation issued.

HOYT H. WHEELER, *Judge.*

(Endorsed:) United States Circuit Court, District of Vermont.—Boston & Maine Railroad, Plaintiff in Error, *vs.* John N. Gokey, Defendant in Error.—Writ of Error.—#17.—Young & Young, Att'ys for Pl'ff in Error.—Filed September 11th, 1905.—Geo. E. Johnson, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to John N. Gokey, of Derby, in the County of Orleans and District of Vermont, and Harlan B. Howe, his attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit, to be held at the City of New York, in the State of New York, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the District of Vermont, wherein the Boston and Maine Rail-
3 road is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 11th day of September, A. D. 1905, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] HOYT H. WHEELER,
Judge of the Circuit Court.

We, John N. Gokey and Harland B. Howe, attorney for said John N. Gokey, each for himself, hereby accept service of the within citation and waive any other, different or further service of the same.

St. Johnsbury, Vermont, September 16, 1905.

JOHN N. GOKEY,
By HARLAND B. HOWE,
His Attorney.
HARLAND B. HOWE.

(Endorsed:) United States Circuit Court, District of Vermont.—Boston & Maine Railroad, Pl'ff in Error, *vs.* John N. Gokey, Def't in Error.—Citation.—#18.—Young & Young, Att'ys for Pl'ff in Error.—Returned service accepted September 18, 1905.—Geo. E. Johnson, Clerk.—Original.

UNITED STATES OF AMERICA, *District of Vermont, ss:*

I, Geo. E. Johnson, Clerk of the Circuit Court of the United States of America for the District of Vermont, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto,
4 do hereby certify that the following pages, numbered from 1 to 175, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Boston & Maine Railroad, plaintiff in error, *vs.* John N. Gokey, defendant in error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of said Court to be hereunto affixed, at the City of Burlington, in the District of Vermont, in the Second Circuit, this 4th day of November, A. D. 1905, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] GEO. E. JOHNSON, *Clerk.*

Circuit Court of the United States, District of Vermont. At Law.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Be it remembered, that at a term of the Circuit Court of the United States, begun and holden at Windsor, in and for the Vermont District, in the Second Circuit, on the 17th day of May, A. D. 1904, comes John N. Gokey, of Derby, in the County of Orleans, State and District of Vermont, and a citizen of the State of Vermont, and files his writ against the Boston & Maine Railroad, a corporation created, organized and existing under and by
5 virtue of the laws of the Commonwealth of Massachusetts, and having its principal office for the transaction of its business at Boston, in the District of Massachusetts, and having one of its offices for the transaction of its business at Lyndon, in the County of Caledonia, in the District of Vermont, which said writ, with the officer's return thereon, is in the words and figures following:

UNITED STATES, *Vermont District, To-wit:*

The President of the United States to the Marshal of the Vermont District, or Either of His Deputies, Greeting:

By the authority of the United States, you are hereby commanded to attach the goods, chattels or estate of the Boston & Maine Railroad, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and having its principal office for the transaction of its business at Boston, in the District of Massachusetts, and having one of its offices for the transaction of its business at Lyndon, in the District of Vermont, to the value of fifteen thousand dollars, and it notify according to law, and also notify it to appear before the Circuit Court of the

Second Circuit of the United States, next to be holden at Windsor, within and for the said District, on the third Tuesday of May next, then and there to answer unto John N. Gokey, who is a citizen of the State of Vermont, and a resident of Derby, in the District of Vermont, in a plea of the case for that the defendant before and at the time of committing the grievances hereinafter mentioned, operated and maintained a certain railroad and the appurtenances thereto belonging, to wit, at Lyndon, in the County of Caledonia,
6 and District of Vermont, and the plaintiff was then and there employed by the defendant to perform the duties of a brakeman on its said railroad, and the defendant then and there carelessly and negligently erected and maintained, near one of its railroad tracks, a certain iron switch staff of great height, to wit, of the height of six and one-half feet, so that it was near the sides of certain freight cars hereinafter mentioned, to wit, two feet therefrom, and so that it extended vertically upward parallel to the sides of, and a great distance above the floors of said freight cars, to wit, the distance of three and one-half feet, of all of which the defendant then and there had full knowledge and understanding, but the plaintiff was then and there ignorant thereof; and heretofore, to wit, on the 2d day of November, A. D. 1901, at Lyndon aforesaid, the defendant propelled divers freight cars with great force and speed over said track and by said switch staff, and the plaintiff then and there, in the careful and prudent discharge of the duties of his said employment, mounted one of said cars and rode thereon, to wit, partially on the end and partially on the side thereof, and then and there, by reason of the premises, and without any fault or negligence on his part, he was caught between said car and said switch staff, and thereby he was then and there thrown down on said track and under said car, which then and there passed over him, and by means thereof his left foot and ankle were then and there broken and crushed, and in consequence thereof it became and was necessary for him to have his said foot and ankle amputated, and thereafterwards, on the same day, his said foot and ankle were amputated and thereby wholly lost, and also by means of the premises he was thereby otherwise greatly hurt, bruised, wounded and injured, and became and was sick,
7 lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all of which time he suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains and profits and advantages which he might and otherwise would have derived and acquired, and thereby he was forced and obliged to and did necessarily then and there lay out and expend divers large sums of money, to wit, the sum of five hundred dollars, in and about endeavoring to be cured of his said fractures, bruises and injuries so received as aforesaid, to wit, at Lyndon aforesaid.

And whereas also for that the defendant, before and at the time of committing the grievances hereinafter mentioned, operated and maintained a certain other railroad and the appurtenances thereto

belonging, to wit, at Lyndon, in the County of Caledonia and District of Vermont, and the plaintiff was then and there employed by the defendant to perform the duties of a brakeman on its said railroad, and in the performance of the duties of said employment it became and was necessary for the plaintiff to mount and ride in divers positions and on divers parts of certain freight cars while they were propelled with great force and speed over said railroad, and the defendant then and there carelessly and negligently erected and maintained a certain iron switch staff of great height, to wit, of the height of seven feet, so near one of its railroad tracks, to wit, within four feet thereof, that, although said switch staff was not apparently dangerous to the personal safety of the plaintiff while performing the duties of said employment, yet it was dangerous to the personal safety of the plaintiff while performing the duties of said employment,
8 of all of which the defendant then and there had knowledge, but the plaintiff was then and there ignorant thereof, and heretofore, to wit, on the second day of November, A. D. 1901, at Lyndon aforesaid, the defendant propelled divers freight cars over said track and by said switch staff with great force and speed, and the plaintiff then and there, in the careful and prudent discharge of the duties of said employment, mounted one of said cars and rode thereon, to wit, partially on the end and partially on the side thereof, and then and there, by reason of the premises, and without any fault or negligence on his part, he was struck in his back by said switch staff, and thereby he was then and there thrown down on said track and under said car, which then and there passed over his body, and by means thereof his left foot and ankle were then and there broken and crushed, and in consequence thereof it became and was necessary for him to have his said foot and ankle amputated, and thereafterwards, on the same day, his said foot and ankle were amputated and thereby wholly lost, and also by means of the premises he was thereby otherwise greatly hurt, bruised, wounded and injured, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all of which said time he suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired, and thereby he was forced and obliged to and did necessarily then and there lay out and expend divers large sums of money, to wit, the sum of five hundred dollars, in and about en-
9 deavoring to be cured of his said fractures, bruises and injuries so received as aforesaid, to wit, at Lyndon aforesaid.

And whereas also for that the defendant, before and at the time of committing the grievances hereinafter mentioned, operated and maintained a certain other railroad and the appurtenances thereto belonging, to wit, at Lyndon, in the County of Caledonia and District of Vermont, and the plaintiff was then and there employed by the defendant to perform the duties of a brakeman on its said railroad, and it then and there became and was the duty of the defend-

ant to operate and maintain its said railroad and appurtenances so as to be reasonably safe for the plaintiff to perform the duties of his said employment; yet the defendant, not regarding its duty in that behalf, did not then and there operate and maintain its said railroad and appurtenances so as to be reasonably safe for the plaintiff to perform the duties of his said employment, but wholly neglected so to do, and then and there well knowing that it was necessary for the plaintiff, in the performance of the duties of his said employment, to mount and ride in divers positions and on divers parts of certain freight cars, to wit, on the ends, sides and tops thereof, while said cars were propelled by the defendant with great force and speed over said railroad, then and there carelessly and negligently erected and maintained a certain iron switch staff of great height, to wit, of the height of six and one-half feet, so near one of its railroad tracks, to wit, within four feet thereof, that, although said switch staff was not apparently dangerous and perilous to the personal safety of the plaintiff, while in the careful and prudent discharge of the duties of said employment, yet it was dangerous and perilous to the personal safety of the plaintiff while in the careful and prudent discharge of the duties of his said
10 employment, of all of which the defendant then and there had full knowledge and understanding, but the plaintiff was then and there ignorant thereof, and heretofore, to wit, on the 2d day of November, A. D. 1901, at Lyndon aforesaid, the defendant propelled a certain train of freight cars over said track and by said switch staff with great force and speed, and the plaintiff then and there, in the careful and prudent discharge of the duties of his said employment, mounted one of said cars and rode thereon, to wit, on the side thereof, and then and there, by reason of the premises, and without any fault on his part, he was caught between said switch staff and the side of said car, and thereby was then and there thrown down on said track and under said car, which then and there passed over him, and by means thereof his left foot and ankle were then and there broken and crushed, and in consequence thereof it became and was necessary for him to have his said foot and ankle amputated, and thereafterwards, on the same day, his said foot and ankle were amputated and thereby wholly lost, and also by means of the premises, he was thereby greatly hurt, bruised, wounded and injured, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all of which said time he suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired, and thereby he was forced and obliged to and did necessarily then and there lay out and expend divers large sums of money, to wit, the sum of five hundred dollars,
11 in and about endeavoring to be cured of his said fractures, bruises and injuries so received as aforesaid, to wit, at Lyndon aforesaid.

And whereas also for that the defendant, before and at the time of committing the grievances hereinafter mentioned, operated and maintained a certain other railroad and the appurtenances thereto belonging, to wit, at Lyndon, in the County of Caledonia and District of Vermont, and the plaintiff was then and there employed by the defendant to perform the duties of a brakeman on its said railroad, and in the performance of the duties of his said employment it became and was the duty of the plaintiff to mount and ride in divers positions, and on divers parts of certain freight cars while they were propelled by the defendant with great force and speed over its said railroad and the defendant then and there carelessly and negligently erected and maintained a certain iron switch staff of great height, to wit, of the height of six and one-half feet, so near one of its railroad tracks, and so near the sides of certain freight cars while they were propelled by the defendant with great force and speed over said railroad track, that it became and was an invisible peril and danger to the personal safety of the plaintiff while he was in the careful and prudent discharge of the duties of his said employment, of all of which the defendant then and there had full knowledge and understanding, but the plaintiff was then and there ignorant thereof, and it then and there became and was the duty of the defendant to give the plaintiff notice and warning of said invisible peril and danger to his personal safety while he was performing the duties of his said employment, which was then and there within the knowledge of the defendant, but of which the plaintiff was then and there ignorant; yet the defendant, not regarding its duty in that behalf, did not then and there give the plain-
12 tiff notice and warning of said invisible peril and danger to his personal safety while he was performing the duties of his said employment, which was then and there within the knowledge of the defendant and of which the plaintiff was then and there ignorant, but carelessly and negligently neglected to do so, and heretofore, to wit, on the 2d day of November, A. D. 1901, at Lyndon aforesaid, the defendant propelled certain freight cars over said track and by said switch staff with great force and speed, and the plaintiff then and there, in the careful and prudent discharge of the duties of his said employment, mounted one of said cars and rode thereon, to wit, partially on the end and partially on the side thereof, and then and there, without any fault or negligence on his part, by reason of the carelessness of the defendant in not giving the plaintiff notice and warning of said invisible peril and danger, to wit, that said switch staff was erected and maintained as aforesaid, the plaintiff was then and there caught between said switch staff and said car, and thereby he was then and there thrown down on said track and under said car, which then and there passed over his body, and by means thereof his left foot and ankle were then and there broken and crushed, and in consequence thereof it became and was necessary for him to have his said foot and ankle amputated, and thereafterwards, on the same day, his said foot and ankle were amputated and thereby wholly lost, and also by means of the premises, he was thereby otherwise greatly hurt, bruised, wounded and

injured, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all of which said time he suffered and underwent great pain, and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time
13 to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired, and thereby he was forced and obliged to and did necessarily then and there lay out and expend divers large sums of money, to wit, the sum of five hundred dollars, in and about endeavoring to be cured of his said fractures, bruises and injuries so received as aforesaid, to wit, at Lyndon aforesaid.

And whereas also for that the defendant, before and at the time of committing the grievances hereinafter mentioned, operated and maintained a certain other railroad and the appurtenances thereto belonging, to wit, at Lyndon, in the County of Caledonia and District of Vermont, and the plaintiff was then and there employed by the defendant to perform the duties of a brakeman on its said railroad, and the defendant then and there constructed and maintained a certain switch staff, to wit, an iron rod of great height, to wit, of the height of six and one-half feet, so near one of its railroad tracks, to wit, within four feet thereof, that it became and was an invisible peril and danger to the personal safety of the plaintiff while performing the duties of said employment as hereinafter mentioned, of which the defendant then and there had full knowledge and understanding, but the plaintiff was then and there ignorant thereof, and it became and was necessary for the plaintiff in the performance of the duties of said employment to ride on the sides of certain freight cars with his back toward said switch staff while said cars were propelled over said track and by said switch staff with great force and speed, and the defendant then and there carelessly and negligently neglected to give the plaintiff notice and warning of said invisible peril and danger, and by reason thereof the plain-
14 tiff, on the 2d day of November, A. D. 1901, at Lyndon aforesaid, while riding on a certain freight car with his back toward said switch staff, then and there in the careful and prudent discharge of the duties of said employment, which said car was then and there propelled over said track and by said switch staff with great force and speed, he was struck by said switch staff, without any fault or negligence on his part, and thereby he was thrown down on said track and under said car, which then and there passed over his body, and by means thereof his left foot and ankle were then and there broken and crushed, and in consequence thereof it became and was necessary for him to have his said foot and ankle amputated, and thereafterwards, on the same day, his said foot and ankle were amputated and thereby wholly lost, and also by means of the premises he was thereby otherwise greatly hurt, bruised, wounded and injured, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all of which said time he suffered and underwent great pain,

and was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits an advantages which he might and otherwise would have derived and acquired, and thereby he was forced and obliged to and did necessarily then and there lay out and expend divers large sums of money, to wit, the sum of five hundred dollars, in and about endeavoring to be cured of his said fractures, bruises and injuries so received as aforesaid, to wit, at Lyndon aforesaid.

All to the damage of the said John N. Gokey, fifteen thousand dollars, to recover which, with just costs, he brings suit.

15 And have you then there this writ, with your doings herein.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Burlington, in the District of Vermont, this 25th day of April, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

[SEAL.] GEO. E. JOHNSON, *Clerk.*

UNITED STATES OF AMERICA, *District of Vermont, ss:*

At Lyndon, in said District, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within defendant The Boston & Maine Railroad Company its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. & M. R. R. Co. by H. E. Folsom, one of its accredited agents, and a division superintendent within said District. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and superintendent aforesaid, at his office at Lyndonville, in said District, with my doings thereon endorsed.

Attest: HORACE W. BAILEY,
United States Marshal.

(Endorsed:) Filed May 17th, 1904.—Geo. E. Johnson, Clerk.

And thereupon it was ordered that said cause be entered on the docket of this Court, and it was so entered.

And afterwards, and on the same 17th day of May, A. D.
16 1904, plaintiff filed an affidavit and petition to be relieved from filing bond as security for costs, which said affidavit and petition is in the words and figures following:

United States Circuit Court, District of Vermont.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

And now comes the said John N. Gokey, and respectfully represents that he is a citizen of the United States, a resident of the District of Vermont, and the plaintiff in the above-entitled cause; that because of his poverty he is unable to pay the fees and costs of said suit, or to give security for the same; and that he believes he is entitled to the redress which he seeks in and by said suit.

And he further respectfully represents that on and before the 2d day of November, A. D. 1901, he was employed by the defendant to perform the duties of a brakeman on its railroad; that the defendant carelessly and negligently constructed and maintained within four feet of one of its railroad tracks, in Lyndon, in the District of Vermont, an iron switch staff six and one-half feet high; that on the 2d day of November, A. D. 1901, the defendant propelled a certain train of cars over said track with great force and speed; that he was riding partially on the end and partially on the side of one of said cars, with his back towards said switch staff, in the careful and prudent discharge of the duties of said employment, and then and there, by reason of the carelessness and negligence of the defendant
17 in erecting and maintaining said switch staff as aforesaid, he was caught between said switch staff and the side of said car, and thrown down on said track and under said car, which passed over him, and thereby his left foot and ankle were broken and crushed, and it became and was necessary to have them amputated, and they were amputated, and he was otherwise greatly hurt, bruised, wounded and injured; and that the above-entitled suit is instituted to recover damages which he suffered by reason of the carelessness and negligence of the defendant as aforesaid.

Wherefore, he humbly prays this Honorable Court to permit him to proceed with said suit without requiring him to pay the fees or costs therein, and without requiring him to give security therefor, in accordance with the statute in such case made and provided.

JOHN N. GOKEY.

DISTRICT OF VERMONT, *ss:*

At Newport this 9th day of April, A. D. 1904, John N. Gokey personally appeared and made oath to the truth of the foregoing petition by him subscribed.

Before me,

[L. S.]

H. S. ROOT,
Notary Public.

DISTRICT OF VERMONT, *ss:*

At Newport, this 9th day of April, A. D. 1904, John N. Gokey personally appeared and made oath to the truth of the foregoing petition by him subscribed.

Before me,

[L. S.] HOMER THRASHER,
Notary Public.

(Endorsed:) Filed May 17, 1904. Geo. E. Johnson, Clerk.

18 And on the same 17th day of May, A. D. 1904, defendant filed its plea in said cause, which said plea is in the words and figures following:

United States Circuit Court, Second Circuit, District of Vermont, May Term, 1904.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Defendant's Plea.

And now the defendant in the above-entitled cause, the Boston & Maine Railroad, by its attorneys, Young & Young, comes and defends the wrong and injury when, etc., and says that at the time of the issuing of the original writ of the plaintiff in the above-entitled suit, the defendant was and still is a corporation duly created, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts; that it then had, ever since has had and now has its principal office and place of business in Boston, in the County of Suffolk, in said Commonwealth of Massachusetts; that it then was, ever since has been and now is a citizen and resident of said Commonwealth of Massachusetts; that at the time of the issuing of the original writ in this cause, to wit, on the 25th day of April, 1904, this defendant was in possession of the property of and was managing and was operating the railroad of the Connecticut & Passumpsic Rivers Railroad Com-

19 pany in the State of Vermont, to wit, at Lyndon, in the County of Caledonia and District of Vermont, as a lessee of said railroad and railroad property, and was not operating said railroad or railroad property in any other capacity, way or manner except as such lessee; that this defendant then resided without the State of Vermont and was not a citizen of the State of Vermont; that this defendant, at the time of the issuing of the original writ in this cause, to wit, on the 25th day of April, A. D. 1904, and at the time of the service of the original writ in this cause, to wit, on the 2d day of May, A. D. 1904, had and at all times since said 25th day of April, 1904, has had and now has a large number of station agents and depot masters, to wit, twenty-five station agents

and depot masters, in its employ resident within the State of Vermont.

And this defendant further says that at the time of the issuing of the original writ in this cause, to wit, on the 25th day of April, 1904, this defendant had not appointed and has not since appointed and had not on the day of the service of the original writ in this cause, to wit, on the 2d day of May, 1904, appointed and has not since appointed any person resident in the State of Vermont upon whom service of process issued against this defendant may or might be made and that this defendant had not on said 25th day of April, 1904, and has not since filed in the office of the Clerk of the County Court in any county through which said railroad passes, a certificate designating the name and residence of a person upon whom service of process issued against this defendant may be made and at the date when said original writ issued, to wit, on the 25th day of April, 1904, and at the date when Horace W. Bailey, United States Marshal for the District of Vermont attempted to serve the original writ in this cause, there was no person residing
20 within the State of Vermont authorized or appointed by this defendant as a person resident in this State upon whom service of process issued against this defendant may or might be made in accordance with Vermont statutes, Section 3948 and 3949, and there never has been since said 25th day of April, 1904, and is not now such a person resident within the State of Vermont.

This defendant further says that the only service or attempted service of the original writ in this cause was made on the 2d day of May, A. D. 1904, at Lyndon, in the District of Vermont, by Horace W. Bailey, United States Marshal, in the manner and form shown by the returns of said Marshal endorsed upon said writ, which return is in the words and figures following, viz.:

"UNITED STATES OF AMERICA, *District of Vermont, ss:*

At Lyndon, in said District, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within named defendant The Boston & Maine Railroad Company, its locomotive engines numbered *650 and 651*, the same being designated to me as the property of the said B. & M. R. R. Co., by H. E. Folsom, one of its accredited agents and a division superintendent within said District. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and superintendent aforesaid, at his office at Lyndonville, in said district, with my doings thereon endorsed.

Attest:

HORACE W. BAILEY,
United States Marshal."

21 This defendant further avers that no other, further nor different service was made of the original writ in this cause than the service shown by the said return endorsed upon said writ, and

said original writ, with the return thereon, are referred to and made a part of this plea.

This defendant further says that said Horace W. Bailey, United States Marshal, attempted to serve the original writ in this cause upon this defendant on the 2d day of May, 1904, at Lyndon, in the District of Vermont, by attempting to attach as the property of this defendant two engines numbered 650 and 651, in the manner stated in the return endorsed upon said writ hereinabove set forth, and that no other nor different attachment of any property of this defendant upon the original writ in this cause was ever made or attempted to be made in any manner or form.

This defendant further says that on the 2d day of May, 1904, at said Lyndon, said Horace W. Bailey, United States Marshal, attempted to make service of the original writ in this cause upon this defendant by leaving a true and attested copy of the original writ in this cause in the hands of H. E. Folsom, one of this defendant's "accredited agents and a division superintendent within said district," at his office at Lyndonville, in said District, with said Marshal's doings thereon endorsed.

This defendant further says that H. E. Folsom, the person upon whom service of the original writ in this cause was attempted to be made and to whom a copy of the original writ in this cause was delivered, was not on the day of the service of the original writ in this cause, to wit, on the 2d day of May, 1904, and never before said date was and never since said date has been a person residing within the State of Vermont upon whom service of process issued
22 against this defendant may or might be made, and that said Folsom, on the day of the attempted service of the original writ in this cause, to wit, on the 2d day of May, 1904, was not and never has been since said date and is not now a station agent or depot master in the employment of this defendant.

And this defendant says that no other nor different service was ever made or attempted to be made of the original writ in this cause upon this defendant than the attempted service hereinabove stated; that no copy of said writ, that no notice of said attachment, that no list of the articles attached, attested by the officer serving said writ was ever delivered to this defendant nor to any person resident in the State of Vermont appointed by this defendant as a person upon whom service of process against this defendant may be made, nor to any station agent nor to any depot master in the employment of this defendant.

And this defendant says that this defendant has never accepted service of said writ in any way or manner.

Wherefore, because no due nor proper nor legal service of the original process in this cause has ever been made upon this defendant, this defendant prays judgment of said writ, declaration and attempted service and that said writ and declaration may be dismissed.

BOSTON & MAINE RAILROAD,
By its Attorneys, YOUNG & YOUNG.

John Young, one of the attorneys of the defendant in this cause and an attorney of this Court, maketh oath and saith that the foregoing plea is true in substance and fact. —— ——.

23 Sworn to at Windsor, in the District of Vermont, this 17th day of May, A. D. 1904, before me,

GEO. E. JOHNSON, *Clerk.*

(Endorsed:) Filed May 17, 1804.—Geo. E. Johnson, Clerk.

And on the same 17th day of May, A. D. 1904, the defendant filed its motion to dismiss, which said motion is in the words and figures following:

United States Circuit Court, Second Circuit, District of Vermont, May Term, 1904.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Motion to Dismiss.

Now comes the defendant in the above-entitled cause, the Boston & Maine Railroad, by its attorneys, solely for that purpose, and moves to dismiss said action for the following reasons:

First. Because the original writ in this cause was not issued in accordance with the provisions of Section 911 of the Revised Statutes of the United States in this, that said writ is not under the seal of this Court.

24 Second. Because the original writ in this cause is not in accordance with the provisions of Section 914 of the Revised Statutes of the United States.

Third. Because said writ was not served in accordance with the provisions of Section 914 of the Revised Statutes of the United States.

Fourth. Because said writ is not in conformity with Sections 1060, 1088, 1089 and 1090 of the Vermont Statutes and No. 137 of the Acts of 1898 as to form, time of service, time of return, nor as to the time when the defendant is required to appear in said cause, nor as to the time when the defendant shall answer to said action; but, on the contrary thereof, the writ in this cause is made returnable twenty-two days from its date and requires the defendant to appear in Court and to answer to said action twenty-two days from the date of said writ.

Fifth. Because the writ in this cause does not contain the following direction to the officer, viz.: "Fail not but service and return make within twenty-one days from the date hereof."

Sixth. Because said writ is not in accordance with the statute law of Vermont which was in force June 1, 1872, and which required that a writ against a corporation should be served at least thirty days before the session of the Court to which it is made returnable; whereas, the writ in this cause bears the date the 25th day of April, 1904, and is made returnable on the third Tuesday of May then next,

which is the 17th day of May, 1904, and which is only twenty-two days before the session of the Court to which it is made returnable.

25 Seventh. Because the writ in this cause is made returnable to a session of Court to be held less than thirty days from the day of the date of said writ.

Eighth. Because the original writ in said cause was not served upon the defendant at least thirty days before the session of Court to which it is made returnable.

Ninth. Because the original writ in said cause was not served upon the defendant "by leaving a copy of the process with a station agent, or depot master, in the employment of the defendant," as required by Vermont Statutes, Sections 3948, 3949.

Tenth. Because the defendant is a corporation organized and existing under and by virtue of the laws of Massachusetts and is a citizen of Massachusetts, and before and at the time of the issuance of the original writ in this cause "operated and maintained said certain railroad and the appurtenances thereto belonging, to wit, at Lyndon, in the County of Caledonia, and District of Vermont," as lessee of said railroad property and not otherwise; and the original writ in this cause was not served upon the defendant "by leaving a copy of the process with a station agent, or depot master, in the employment of the defendant," as required by Vermont Statutes, Sections 3948, 3949.

Eleventh. Because the pretended attachment of defendant's engines numbered 650 and 651 is not made in accordance with the Vermont Statutes, Section 1109, in that no copy of the attachment and list of the articles attached, attested by the officer serving

26 the same, was delivered to the defendant nor left at its then usual abode, nor left with its known agent or attorney, nor left at the place where such goods or chattels were attached, by reason whereof said pretended attachment is absolutely null and void.

Twelfth. Because this Court has no jurisdiction of said action.

Thirteenth. Because there are no allegations in the writ or in the declaration averring the diversity of citizenship of the parties to said action and no allegation or allegations giving this Court jurisdiction of said cause.

Fourteenth. Because the Court has no jurisdiction of the defendant.

The original writ and declaration and the officer's return thereon are referred to and made a part of this motion.

BOSTON & MAINE RAILROAD,
By Its Attorneys, YOUNG & YOUNG.

(Endorsed:) Filed May 17th, 1904.—Geo. E. Johnson, Clerk.

And on the same 17th day of May, A. D. 1904, Young & Young entered and appeared as attorneys for defendant, specially as to plea and motion to dismiss.

And afterwards, and on the 31st day of May, A. D. 1904, plaintiff filed his replication in said cause, which said replication is in the words and figures following:

27 United States Circuit Court, Second Circuit, District of Vermont, May Term, 1904.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Plaintiff's Replication.

And the said plaintiff saith that his said writ by reason of anything by the said defendant in *his* said plea alleged, ought not to be quashed, because he saith that the said H. E. Folsom was, on the day of the service of the original writ in this cause, to wit, on the second day of May, A. D. 1904, a person residing within the State of Vermont upon whom service of process issued against this defendant might be legally made, to wit, an agent of this defendant. And this he, the said plaintiff, prays may be inquired of by the country, etc.

JOHN N. GOKEY,
By HARLAND B. HOWE, *Attorney.*

(Endorsed:) Filed May 31, 1904.—Geo. E. Johnson, Clerk.

28 And on the same 31st day of May, A. D. 1904, the plaintiff filed his motion for the Court to order the defendant's motion by it filed in said cause to be stricken from the docket and files of said Court; which said motion is in the words and figures following:

United States Circuit Court, Second Circuit, District of Vermont, May Term, A. D. 1904.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Plaintiff's Motion.

And now comes the plaintiff in the above entitled cause, by Harland B. Howe, his attorney, and moves this Honorable Court to order the defendant's motion by it filed in the above entitled cause to be stricken from the docket and files of said Court, because he says that the defendant has filed a plea in abatement in said cause, wherein it prays that the plaintiff's original writ be quashed because of an alleged defect in the service thereof, as by the docket entries and files in said cause, reference being thereto had, will, amongst other things, more fully and at large appear.

By His Attorney, HARLAND B. HOWE.

(Endorsed:) Filed May 31, 1904.—Geo. E. Johnson, Clerk.

29 And afterwards, and on the 8th day of June, A. D. 1904, the Court handed down its decision on defendant's motion to dismiss; which said decision is in the words and figures following:

United States Circuit Court, District of Vermont. At Law.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

WHEELER, *J.*:

The statutes of the United States require the practice pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, to conform as near as may be to those of like causes at the time in the courts of record of the State. Rev. Stat. 914. Those in the State now require writs in such cases as this to contain the direction: "Fail not but service and return make within twenty-one days from date hereof;" and require the writs to be served within twenty-one days from date, and the defendant to enter an appearance within forty-two days. Rule VIII of this Court, made before the present law of the State in this respect, requires that "all mesne process shall be returnable to the next regular term, if there shall be time for reasonable service thereof according to the laws of this State." The writ in this case is one of attachment dated twenty-two days before, and made returnable at this term, and was served by attaching the property of the de-

30 fendant. Attorneys appeared for the defendant on the first day of the term for the purpose only of filing a motion to dismiss and a plea in abatement, and did file such a motion founded upon the form of the writ, except where it contained issuable allegations not allowable in such motions, and a plea in abatement on account of the service. The plaintiff has filed a replication to the plea not yet answered, and a motion to dismiss the defendant's motion as incompatible with the plea, and these motions have been heard.

Apparently the defendant's motion to dismiss should not be dismissed, whatever the effect of that and the plea may be upon each other, but should stand for what it amounts to as it comes up for hearing before the plea. A defect in the writ apparent on its face may be reached in this way. It properly now raises the question whether this is a good writ.

This question would be more serious and difficult but for Sec. 918, Rev. Stat., which provides that the several circuit and district courts may, from time to time, "make rules and orders directing the returning of writs and processes," "as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." In the State courts there are but two terms in a year having jurisdiction of such cases; and it appears to have been thought best to have writs returnable oftener; but this Court has three regular terms in each year, and it has not been considered

that to have writs returnable oftener, would be advantageous for the advancement of justice or the prevention of delays. Therefore, the rule requiring such process to be returnable at the regular terms has been retained without change. That this course is proper seems to appear not only from the words of the statutes, but from Shepard *vs.*
Adams, 168 U. S., 618, where a summons made returnable
31 according to a rule of the Federal Court and not in conformity with a changed State statute, was, after full examination of the subject, upheld.

Upon this view this writ appears to be regular and good; and the defendant's motion to dismiss must be overruled. The plea in abatement must remain for termination in an issue of fact or of law.

Motion to dismiss overruled.

Harland B. Howe, for Plaintiff;
George Young, for Defendant.

(Endorsed:) Filed June 8, 1904.—Geo. E. Johnson, Clerk.

And afterwards, and on the 5th day of July, A. D. 1904, the defendant filed *his* demurrer to the plaintiff's replication; which said demurrer is in the words and figures following:

United States Circuit Court, Second Circuit, District of Vermont.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Demurrer to Replication.

And the said defendant saith that the replication of said
32 plaintiff to the said plea of the said defendant and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that it, the said defendant, is not bound by law to answer the same. Wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment of said writ, declaration and attempted service of said writ and that said writ and declaration be quashed; and the said defendant, according to the form of the statute in such cases made and provided, states and shows to the Court here the following causes of demurrer in law to the said replication, that is to say:

1st. That said plaintiff's replication does not traverse any averment or averments in said plea;

2nd. That said replication does not confess and avoid in whole or in part the matters and things set forth in the defendant's plea;

3rd. That said replication avers a legal conclusion;

4th. That said replication states no material fact nor facts which are traversable;

5th. That said replication is not responsive to the defendant's plea;

6th. That plaintiff's replication states no fact showing or tending to show that H. E. Folsom was a person upon whom service of process against this defendant could or might be properly or legally made;

33 7th. That said replication avers no fact showing that said H. E. Folsom is an agent of this defendant upon whom process could or might be legally or properly made;

8th. That said replication has no proper or suitable prayer in that it contains no prayer for the assessment of damages.

And also for that the said replication is, in other respects, uncertain, informal and insufficient.

BOSTON & MAINE RAILROAD,
By its Attorneys, YOUNG & YOUNG.

(Endorsed:) Filed July 5, 1904.—Geo. E. Johnson, Clerk.

And afterwards, and on the 9th day of July, A. D. 1904, the Court handed down its decision overruling defendant's demurrer and adjudging plaintiff's replication sufficient; which said decision is in the words and figures following:

United States Circuit Court, District of Vermont. At Law.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

WHEELER, *J.*:

This cause has now been heard on demurrer to a replication to a plea in abatement for defective service of the writ.

34 The writ issued and was served as an attachment. The Vermont statutes provide:

"SEC. 1109. When the goods or chattels of a person are attached at the suit of another, a copy of the attachment and a list of the articles attached, attested by the officer serving the same shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, as directed in the service of summons, and if such person is not an inhabitant of the State, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached;"

"SEC. 21. The word person may extend and be applied to bodies corporate and politic."

Under these statutes writs of attachment properly issue against the property of corporations. Dow *vs.* School Dist. 46 Vt., 108.

The marshal's return showing the service made is:

"UNITED STATES OF AMERICA, *District of Vermont, ss:*

An Lyndon, in said district, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within named defendant, The Boston & Maine Railroad Company, its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. & M. R. R. Co., by H. E. Folsom, one of its accredited agents and a Division Superintendent within said district. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and Superintendent aforesaid, at
35 his office at Lyndonville, in said district, with my doing thereon indorsed.

Attest:

HORACE W. BAILEY,
United States Marshal."

The plea fully denies any other or different service, and alleges that defendant was a non-resident lessee in possession of, and managing and operating a railroad in this State, and that Folsom was not at the time of the service and never "has been a person residing within the State of Vermont, upon whom service of process issued against this defendant may or might be made." The replication alleges that Folsom was at that time "A person residing within the State of Vermont upon whom service of process issued against this defendant might be legally made, to wit, as agent of this defendant." It is to this that the defendant has demurred.

It is doubtful whether a replication to a plea in abatement is ever necessary; for in the strictness required of such a plea whatever might be brought forward by replication that would help the process should be met by the plea, or that would itself be bad. But if a replication to the plea instead of a demurrer is filed, if of itself bad, it might be good enough for a bad plea. The statutes of the State of Vermont, Stat., Sec. 3948, provide for the appointment by such a lessee of a person resident in the State upon whom service of process may be made. The known agent of a non-inhabitant with whom the copy of an attachment and a list of the articles attached may be left, may not be a person upon whom, by appointment, service of process generally may be made. Folsom may have been such an agent about this property attached, and not such an appointed person for service of process upon. And leaving
36 a copy in the same custody as that of the goods or chattels attached would be leaving it at the place where they were attached, although the custodian may have no other agency. Hill *vs.* Warren, 54 Vt., 78.

The division superintendent of the railroad of the defendant designating the locomotives attached as its property might well be taken to be the known agent, or the accredited agent as styled by the marshal of the defendant about the custody of those articles, and leaving a copy of the attachment and a list of them with him would be a leaving with a known agent of the defendant within the mean-

ing of the statute, or at the place where they were attached within the same meaning.

The statutes provide, Vt. Stat., Sec. 3949, that on failure to appoint such a person for receiving service of process it "May be made by leaving a copy of the process with a station agent or depot master in the employment of," the lessee. The plea alleges that the defendant had at the time of the service many station agents and depot masters in its employment in this State, to wit, twenty-five, with whom a copy might have been left, and that Folsom was not one of them. But this statute only furnishes an additional mode of service, generally, and does not require service of an attachment to be made upon station agents or depot masters, nor supersede service of such process in the mode otherwise provided.

The plea was bad for not denying Folsom's agency about, or custody of, the property, and the replication bringing that agency forward is good, or good enough for such a plea.

Demurrer overruled, and replication adjudged sufficient.

Harland B. Howe, for Plaintiff.
George B. Young, for Defendant.

(Endorsed:) Filed July 9, 1904.—Geo. E. Johnson, Clerk.

37 And afterwards, and on the 30th day of September, A. D. 1904, the defendant filed its plea in said cause; which said plea is in the words and figures following:

United States Circuit Court, District of Vermont, October Term, 1904.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Defendant's Plea.

And the said defendant, by Young & Young, its attorneys, comes and defends the wrong and injury, when, etc., and says, that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this it, the said defendant, puts itself upon the country, etc.

BOSTON & MAINE RAILROAD,
By its Attorneys, YOUNG & YOUNG.

(Endorsed:) Filed Sept. 30, 1904.—Geo. E. Johnson, Clerk.

And afterwards, and at the said May Term, A. D. 1904, said cause was continued to the October Term, A. D. 1904, of said Court.

38 And afterwards, and on the 31st day of October, A. D. 1904, the plaintiff filed his motion to impose terms on defendant; which said motion is in the words and figures following:

United States Circuit Court, District of Vermont, May Term, A. D. 1904.

JOHN N. GOKEY
v.
BOSTON & MAINE RAILROAD.

Plaintiff's Motion.

And now comes the plaintiff and moves this Honorable Court to impose terms on the defendant if it is allowed to replead; because,

1st. At the May term it made a motion to dismiss the plaintiff's writ which on hearng was overruled.

2d. It filed a demurrer to the plaintiff's replication which on hearing was overruled.

All of which appears by the records of the Court.

JOHN N. GOKEY,
By HARLAND B. HOWE, *Attorney.*

(Endorsed:) Filed Oct. 31, 1904.—Geo. E. Johnson, Clerk.

And afterwards, and on the 22d day of November, A. D. 1904, Young & Young appeared and entered as attorneys for the defendant.

39 And afterwards, and at the February Term, A. D. 1905, said cause was continued until the May Term, A. D. 1905, of said Court.

And afterwards, and on the 1st day of June, A. D. 1905, a day in the May Term, A. D. 1905, of this Court, said cause came on for trial before the Hon. Hoyt H. Wheeler, Judge of the District Court of the United States, within and for the District of Vermont, sitting in the Circuit Court, and a jury; and after the introduction of evidence by both the plaintiff and defendant, counsel for defendant filed a motion that the Court direct a verdict for the defendant; which said motion is in the words and figures following:

United States Circuit Court, May Term, 1905.

JOHN N. GOKEY
vs.
BOSTON & MAINE R. R. Co.

Defendant's Motion for Verdict.

Defendant moves the Court to order a verdict for the defendant, because:

No negligence is shown on the part of the defendant either in the location, the height or the construction of the switch where plaintiff was injured, or of the switch target or the switch stand.

On his own evidence, the plaintiff was guilty of contributory negligence.

On his own evidence, plaintiff was guilty of negligence which contributed to his injury.

The whole evidence fails to show a cause of action.

The whole evidence fails to establish in favor of plaintiff a right to recover.

On the whole evidence, the plaintiff is not entitled to recover.

(Endorsed:) Filed June 1, 1905.—Geo. E. Johnson, Clerk.

And afterwards, and on the same 1st day of June, A. D. 1905, said motion was overruled by the Court; whereupon after arguments of counsel by both plaintiff and defendant, and the charge of the Court in said cause, the jury on the 2d day of June, A. D. 1905, rendered a verdict for the plaintiff to recover the sum of $3,350 as damages; which said verdict is in the words and figures following:

United States Circuit Court, District of Vermont, May Term.

At Law. 1905.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Verdict.

In this cause, the jurors upon their oaths say, that the defendant is guilty in manner and form as the plaintiff in his declaration hath alleged; and find for the plaintiff to recover the sum of $3,350 as damages.

J. H. McLAUD, *Foreman.*

(Endorsed:) Filed June 2, 1905.—Geo. E. Johnson, Clerk.

41 And afterwards, and on the 5th day of September, A. D. 1905, it was ordered by the Court that judgment on the verdict be entered and it was so entered.

And afterwards, and on the 6th day of September, A. D. 1905, the defendant filed its bill of exceptions in said cause, which were duly allowed by the Court on the 24th day of July, 1905, a day in said term, and ordered to be filed as a part of the record herein; which said exceptions are in the words and figures following:

United States Circuit Court, District of Vermont, May Term, 1905.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

WHEELER, *J.*

Appearances.

H. B. Howe, E. A. Cook, for Plaintiff.
Young & Young, for Defendant.
Trial at Newport, Vermont, June 1, 1905.

Bill of Exceptions.

Jury Empanelled.

Plaintiff's Testimony.

JOHN N. GOKEY, called. Sworn.

Direct examination by Mr. HOWE:

Q. Your name is John N. Gokey?
A. Yes, sir.
Q. How old are you, Mr. Gokey?
A. I am thirty-six.
42 Q. Where were you born?
A. Was born in West Vermont.
Q. Where were you educated?
A. In Derby.
Q. Common schools?
A. Yes, sir.
Q. How long have you resided or lived in Derby?
A. About six years.
Q. And have you a family?
A. Yes, sir.
Q. Did you have a family when you were injured?
A. I had a wife and four children.
Q. When did you first begin to work at railroading?
A. Well, I began to work in '94—1894.

Q. For what company?
A. For the Boston & Maine Railroad.
Q. In what capacity?
A. As freight brakeman.
Q. How long did you work at that time, Mr. Gokey?
A. About five years.
Q. And have you worked as a freight brakeman all the time?
A. No, I was off two years.
Q. All the time that you have worked for the railroad company?
A. Yes, sir.
Q. You have said, I think, that you worked five years in all?
A. Yes, sir.
Q. And you was off two years?
A. Yes, sir.
Q. That was during the five years' period?
A. Yes, sir.
Q. Now tell the jury where your run was, over what section of the defendant's railroad your work was.
A. Well, part of the time I run between Newport and Sherbrooke, and part of the time between Newport and Lyndonville.
Q. In November, 1901, where was your work?
A. In the Lyndonville yard.
Q. Where was your run?
A. From Newport to Lyndonville and back.
Q. And about what time would you leave Newport?
A. We were due to leave at five o'clock in the morning.
Q. What time did you arrive at Lyndonville ordinarily?
43 A. Somewhere between eight and nine o'clock.
Q. And what time would you leave Lyndonville to return?
A. I think at two o'clock.
Q. What time would you arrive at Newport?
A. At somewhere between four and five o'clock.
Q. Now, Mr. Gokey, you tell what kind of a train it was that you were working on in November, 1901?
A. It was a through freight.
Q. A through freight?
A. A through freight.
Q. And by a "through freight" what do you mean?
A. Why, a through freight is a freight that makes up its load in the yard and there is no shifting along the lines.
Q. You do no local business along?
A. No.
Q. So that when you left Newport with the train your destination was Lyndonville, and no stops between to do work or take on freight?
A. No, not very often, once in a great while we would take on a car, but very seldom.
Q. Now, can you tell the jury at what time you arrived if you went to Lyndonville on November 12, 1901?
A. Well, I should say between eight and ten o'clock.
Q. In the forenoon?
A. In the forenoon.

Q. After you arrived there was you relieved from duty for a time?

A. We was for a while.

Q. For about how long?

A. Oh, for about four hours.

Q. And then what was the first you would have to do in the line of your employment?

A. Make up our train and go home.

Q. Come back to Newport?

A. Yes.

Q. Now, on that day, Mr. Gokey, of whom did the train crew consist?

A. They consisted of myself, Mr. Davidson, conductor; Mr. Kendall, brakeman; Mr. Shattuck, engineer, and Mr. Green, fireman.

44 Q. You had a crew of five men, including yourself, then?

A. Yes.

Q. Now, is the work of the two brakemen divided in some way?

A. Yes, sir.

Q. How is their work divided?

A. It used to be divided. Then, one man broke one way, one man broke the head end going south, and the other man broke the head end coming north.

Q. And were you spoken of and referred to as front brakeman and hind brakeman?

A. Yes.

Q. Now, in going from Newport to Lyndonville, was you the front brakeman or hind brakeman?

A. I was front brakeman.

Q. You was the front brakeman always going down?

A. Yes, sir.

Q. And the hind brakeman going back?

A. Mr. Kendall was the front brakeman coming back.

Q. You was the front brakeman going down and the hind brakeman coming back?

A. Yes, sir.

Q. And that had been so for some considerable time previous to the time you were injured?

A. Yes, sir.

Q. You spoke of going from Newport at about five o'clock in the morning and returning to Newport the same day? Did that make up your day's work going down and back?

A. Yes, sir.

Q. Did you have breakfast somewhere or dinner?

A. We used to have it at Lyndonville.

Q. Get more than one meal at Lyndonville?

A. Sometimes we did.

Q. That would be breakfast and dinner?

A. Yes, sir.

Q. Now, Mr. Gokey, you tell the jury what time of day it was on November 2 that you received an injury, if you did receive an injury?

A. Between two and half-past two.
Q. Where was it?
A. It was in the Lyndonville yard.
45 Q. And was it while you were making up a train to return?
A. Yes, sir.
Q. Now, John, you tell on what side-track it was that you were working at the time of the injury?
A. It was on No. 1 side-track, the first track west of the main line.
Q. Now you tell the jury whether this track No. 1, the first west of the main line, is a long or short one.
A. It is a very long siding.
Q. And you tell the jury how many places there are that you can draw a train in onto the track No. 1 going from the north?
A. There are two.
Q. You may tell the jury, as near as you can, the distance between those two switches that go onto the siding No. 1.
A. Well, about forty rods.
Q. Now, is there any difference in the name of the switches that enter onto that track?
A. Yes.
Q. Tell the jury the names of the two kinds of switches that enter that siding?
A. Well, there is a switch at the upper end, is an ordinary common switch that you go right in straight, and the one at the center where we used to draw the train in is what we call a cut-off; that is, it is a short piece of track that the switch can be set on a long siding or set on the cut-off while the train is drawing in.
Q. Now, what had you been doing, Mr. Gokey, just previous to the time you were injured?
A. We were making up our train.
Q. Whereabouts, on what side tracks?
A. We had been onto the car house and got some cars.
Q. You had been onto the car house? Do you mean by that onto the car house track?
A. Onto the car house track.
Q. There is a siding called the car house track?
A. Yes, sir.
Q. You had been onto that track and got some cars?
A. Yes, sir.
46 Q. Now you tell.
A. And then we got our buggy out and kicked it in the cornfield.
Q. Is that another track called the "cornfield" track?
A. Yes, sir. And I had rode the cars down and put up a brake on the caboose.
Q. On what side-track was that work done, putting up the brake on the caboose?
A. Well, it was on one of the side-tracks in the cornfield, and Mr. Kendall had gone over on No. 1 to get some cars.
Q. Now, when Mr. Kendall went onto No. 1, did any one else or anything go with him?

A. Well, he went with the engine and two cars, I think, and I got off of the buggy and Mr. Davidson told me to go over there and assist him getting off those cars.

Q. Mr. Davidson was the conductor of the train?

A. Yes, sir.

Q. And the man that you were working under?

A. Yes, sir.

Q. And taking orders from?

A. Yes, sir.

Q. Then you were in on a track in the cornfield district?

A. Yes, sir.

Q. When you received directions to go in onto track No. 1 and help get out some cars?

A. Yes, sir.

Q. Now, how did you go over from the cornfield tracks to track No. 1?

A. Walked over.

Q. Now, you tell the jury, as near as you can, about how far it is across there?

A. Well, from where I started it must be about ten rods.

Q. Now, how far would Mr. Kendall have to go with the engine and cars and in what direction would he have to go to get in onto track No. 1?

A. He would have to go about 25 rods north of the cornfield tracks.

Q. And north of the place where you were when you received these directions?

A. Yes, sir.

Q. Now, you say you walked over there?

A. Yes, sir.

47 Q. After you got over there did Davidson and the engine and the other cars appear?

A. Mr. Davidson was gone somewhere.

Q. Mr. Kendall?

A. Yes, he backed up and hitched onto the cars.

Q. And when he hitched onto the cars did you make the hitch?

A. No, sir.

Q. Now, where were you when the cars were hitched together on track No. 1?

A. I was on the east side of track No. 1.

Q. And about what distance from the last car southerly?

A. Well, I couldn't tell you exactly, but probably six or seven or eight rods, somewhere along in there.

Q. Now, what was your duty after those cars were hitched together? What was it your duty to do?

A. My duty was to help Mr. Kendall to shift them out.

Q. Where were they to be taken to?

A. They were to be taken out onto the main line.

Q. Now, will you tell the jury a little more fully if you can what directions the conductor gave you as to taking these cars out from track No. 1. Did he tell you which cars to take?

A. Yes, sir.

Q. Which cars did he tell you to take?

A. He told me to take out the hind one and the head one.
Q. Now, were they cars of a particular description?
A. They were Boston & Maine stock-racks.
Q. Stock-rack cars?
A. Stock-rack cars.
Q. Now, were there any other stock-rack cars in on track No. 1 at the time you went there to perform this work?
A. There was three of them, I believe; I am not positive.
Q. Was there more than two stock-rack cars?
A. No.
Q. Now, can you tell how many cars there were there on that track that you had to haul out at that time?
A. There was three.
48 Q. Now, you say you were to take the first car and the last car?
A. Of those three.
Q. Of those three?
A. Yes.
Q. Can you describe to the jury the kind of a car that was in the middle, the third car?
A. It was a box car, common Boston & Maine box car.
Q. You got started, John, to tell the jury what it was your duty to do, that you was going to ride those cars somewhere? you go ahead and tell us what you would have done there?
A. Well, when we started to go over to switch the cars there was a brake on and when they started the cars it made the brake grind, made it squeak, and it was on the hind car, and when it went by me I mounted the car to go up and let the brake off.
Q. Now, you tell the jury just what portion of the car you got onto?
A. I got onto the north end of the car, the front of the car.
Q. Tell what happened, if anything, to you?
A. I had one foot in the stirrup and I had one hand on the grab handle on the sides of the car, and one foot on the ladder and one hand on the ladder, and was partly on the end and partly on the side, and I received a blow on the back part of the hip here that knocked me off; I fell in a sitting position and my left foot fell on the rail and the hind wheels of the car went over it and crushed my foot.
Q. How badly was your foot crushed?
A. Well it was, it had run over the instep and the heel, and it had flattened the heal out as wide as my hand and about as thick, and it had split the foot over the instep.
Q. Now, after that happened, John, were you taken somewhere?
A. I was taken to the station and to Mr. Webb's hotel at Lyndonville.
Q. And some doctor summoned?
A. Yes, Dr. Copeland from Lyndonville.
Q. And from the hotel were you taken somewhere?
49 A. Taken to the station and put onto the express and taken to Newport.
Q. What time did you arrive here at Newport?

A. Well, about half past five, I should say.
Q. Where were you taken, then?
A. I was taken to my sister's.
Q. You wasn't taken home?
A. No.
Q. Your home was here, then?
A. Yes.
Q. Why wasn't you taken home?
A. My wife was sick.
Q. Was something done to you in the way of surgery after you arrived at your sister's?
A. Yes, my foot was amputated.
Q. At what point was your limb taken off?
A. About three inches above my ankle.
Q. Where did you stay while the limb was healing?
A. I stayed a week to my sister's and then I was taken home.
Q. How long, John, were you in bed by reason of the taking off of the limb?
A. About two weeks.
Q. And then were you up?
A. I was around the house.
Q. How did you get around at that time?
A. On crutches.
Q. How long did you have to go on crutches?
A. Well, about six months.
Q. Now you tell to what extent, if any, you suffered pain during the two weeks you were in bed?
A. Well, I suffered terribly for about ten days.
Q. Able to sleep nights?
A. No, not a great deal.

Mr. YOUNG: If the Court please, we object to that form of the question; the witness is quite able to describe those things without leading questions.

Mr. HOWE: I think the question was, to what extent, if any, he had suffered pain during the time he was in bed.

Mr. YOUNG: You supplemented that.

The COURT: Proceed without being leading.

50 Q. Now, where was it that the pain was?
A. Well, it was in the end of my stump, where it was amputated, and pretty near all over up the leg.
Q. How was it, Mr. Gokey, with reference to pain after you got upon crutches?
A. Well, I suffered about all the time, more or less.
Q. Now, you have some artificial arrangement that you walk around on?
A. Yes, sir; I have an artificial leg.
Q. And when was it that you were able to put that on?
A. Well, it was about six months after I got it that I was able to wear it right along.
Q. About six months after you were injured that you were able to put that on?

A. I got it about six months after I was injured.
Q. Did you put it on?
A. Yes.
Q. Able to wear it right along?
A. No, I had to break it in.
Q. How long did that take?
A. Well, that took about six months.
Q. Now, how much of the first six months that you had the artificial limb were you able to wear it?
A. Well, to commence with, I wore it about an hour a day, and I kept increasing gradually until I got so I could wear it all the time.
Q. And that took about six months?
A. Yes, it took longer than that.
Q. Now that you have got used to the artificial limb, how have you been with reference to suffering pain?
A. Well, I have suffered with it ever since I have had it.
Q. Now, are there certain seasons of the year when it is more severe?
A. Yes.

Objected to as leading.
(Question read.)

A. Yes, there is.
Q. What seasons?
A. In the hot days in the summer and in the cold days in the winter.
51 Q. You tell the jury what makes it worse in the summer, if you know?
A. Well, it is liable to sweat and it will get sore and it will chafe.

Mr. YOUNG: That we object to as being a question of expert speculation, the reason that it is worse at one time than it is another.
The COURT: He knows how it did work.
Mr. YOUNG: The question is what is the reason.
Mr. HOWE: I will leave out the reason.

Q. You tell the jury how it is in the summer season, in the hot season?
A. Well, in the hot season it is a good deal warmer and the leg will sweat and the wrappings will stick to it and it will chafe and it will get sore.
Q. Now, tell how it works in the winter?
A. Well, in the winter it is cold and it affects it more than anything else. It gets cold and I chilled the end of it twice last winter and once the winter before, so that the end of it peeled off and it was raw, and it is very tender and it gets cold very easily.
Q. Now, Mr. Gokey, what difficulty, if any, do you experience during the night time?
A. Well, I have pains that will shoot up through my leg, and the end of my stump will be sore, is always sore.
Q. How has that been during the last year?
A. Well, it keeps up about the same.

Q. Now, in the use of this artificial leg how is the heft of the body supported, on the end of the stump or elsewhere?

A. No, sir, it is supported by a collar that goes around my leg above the knee and by a bearing under the knee and a bearing on the calf of the leg.

Q. So that there is no weight allowed to come onto the very tip of the stub?

A. No, sir.

Q. How much, Mr. Gokey, does your artificial leg weigh? What is the weight?

A. Seven pounds.

52 Q. Are you wearing the same limb now that you had first?

A. Yes, sir.

Q. Now, you tell how long it was before you were able to return to work after you were injured?

A. About thirteen months.

Q. And did you live here in Derby all that time?

A. Yes, sir.

Q. When you mounted this car to release the brake that was squealing, which direction were you facing?

A. I was facing south.

Q. And where was this switch-staff?

A. It was north of me.

Q. How far was it from the point where you mounted the car to the switch-staff?

A. Well, perhaps two or three rods.

Q. Now, where is this switch-staff located with reference to siding No. 1?

A. It is located pretty near the north end of the Lyndonville yards, opposite of the coal chute.

Q. Whether east or west of siding No. 1?

A. It was located east of siding No. 1.

Q. East of siding No. 1?

A. Yes.

Q. How would that be with reference to the main line?

A. It would be located west of the main line.

Q. Now, Mr. Gokey, you tell the jury what it was that made you fall off from this car.

A. Well, it was the switch that knocked me off.

Q. And what switch?

A. It was the switch that stood between No. 1 and the main line.

Q. Was that the switch that entered side-track No. 1?

A. No, sir.

Q. That was the switch that entered the cornfield?

A. Yes, sir.

Q. How long, Mr. Gokey, had this switch that you have just spoken of, that knocked you off the train, been located at that point before you were injured?

A. Oh, between two and three weeks.

53 Q. Now, where was it located before the injury, or before it was brought over to this point just west of the main line?

A. It was east of the main line.

Q. Now, had you operated that switch while it was located over east of the main line?

A. Yes, sir.

Q. And to some considerable extent?

A. Yes.

Q. Now, I want to have you tell how many side-tracks there were west of the main line at the point where this switch staff was located at the time you were injured?

A. Four.

Q. Now, do they have some particular names?

A. Yes.

Q. You may tell the jury what the names of them are?

A. There was No. 1 engine house track and shop track and the cattle track.

Q. How far does the railroad land extend westerly of the main line at that point?

Objected to.

Mr. GEO. YOUNG: It doesn't appear that this witness knows the limits of the railroad's land.

Mr. HOWE: I understand he does.

Mr. YOUNG: We say it is of no importance whatever.

Mr. HOWE: It is important in showing that they had plenty of land there and they might have constructed this siding No. 1 at a point a little farther west of this switch staff, so that there would be room for a train and its crew to pass down through there without being pulled off.

Mr. YOUNG: There is no claim in the declaration of any negligence or any improper construction of this railroad yard whatever. The only allegation of negligence or improper construction is simply
54 that the switch stand is too high and is too near this particular track, and we say that anything else is entirely outside of the declaration.

The COURT: I don't see that that would be important now, because if they hadn't room enough they could get room enough to make it safe.

Mr. HOWE: We will pass that over, your Honor. What is the distance, Mr. Gokey, from the main line to the most westerly track, which I think you said was called the cattle yard track?

Objected to.

The COURT: I don't see how that is material. It is west of these tracks. I don't see that that would be material now.

Q. How many tracks are there east of the main line at the point where this switch-stand was located?

Objected to.

Mr. HOWE: I propose to show, if the Court please, the names of these tracks that he had already operated on, to locate the point where he came from when he went to this work when he was injured—those tracks are all names as I understand him.

The COURT: It don't seem to be material to show now. That he complained of was that they had this switch too near, so that when he was on the car he got hit.

Mr. YOUNG: If the Court please, we don't want to be misunderstood. We don't object to showing the tracks that he actually worked on that day in making these motions, but outside of the very tracks that they moved cars on that day we say it is utterly immaterial in this matter.

The COURT: Well, for the present purposes we will keep it right there.

55 Q. In coming into Lyndonville, in setting off the train, what was your duty, if anything, as to setting the switch to go in onto side track No. 12?

A. It was my duty to set the switch to go in.

Q. Now, on what portion of the train would you ride into the yard on from Newport?

A. I should be on the top of the cars.

Q. Front end of the train or hind end?

A. Front end of the train.

Q. It was your duty, you say, to set the switch to let you off from the main line onto side track No. 1?

A. Yes, sir.

Q. Now, what switch was it that you operated or set to get onto that track No. 1?

A. It was the cut-off switch.

Q. Now, you tell the jury where this cut-off switch is located, whether north or south of the switch that you were injured on?

A. It is located about thirty rods south of the switch I was injured on.

Q. Now, in hauling your train into Lyndonville, did you ever have any occasion to operate the switch at the point where you were injured to set the train off?

A. No, sir.

Q. Now, Mr. Gokey, from the time this switch was moved from the point east over to the point just west of the main line, where you were injured, had you ever had occasion to operate it or set it?

(WITNESS:) I didn't understand.

COUNSEL: Had you ever had occasion to set the switch after it had been moved down to the time you were injured?

A. No, sir.

Q. Now, in taking your train out from Lyndonville, did you ever have occasion to go to that switch and set it?

A. No, sir.

Q. Now, you tell the jury what switch it is by which you can enter this track No. 1 at the most northerly point?

56 A. Well, it is about twenty-five rods north of the switch that I was injured on.

Q. Now, after your train is drawn into Lyndonville and you have set this cut-off switch and placed it in on track No. 1, what further duty did you have to perform?

A. Well, I had to set the switch at the south end of No. 1 and let the engine out on the main line.

Q. Now, after the engine is run down to a point south on side track No. 1 onto the main line, where did it go?

A. Backed up north to the cut-off switch.

Q. Now, how would you get back north to the cut-off switch?

A. I should ride back on the engine.

Q. Now, when you arrived back there, what was your duty?

A. To hitch onto the buggy, caboose.

Q. Now, how would you get hitched onto the caboose at that point?

A. By heading it onto the buggy, hitched the shackle onto the front end of the engine, self coupling.

Q. Now, what switch is it that you use to get your engine headed in onto track No. 1 so as to hook the buggy?

A. Use the main line switch, the cut-off.

Q. The same switch that the train entered into track No. 1 on?

A. Yes, sir.

Q. Now, after you get hitched onto the buggy, what was your duty?

A. Well, my duty as front brakeman ended there.

Q. Who took your place, if any one?

A. Mr. Kendall.

Q. Now, did you have anything to do with setting the buggy off from the main line?

A. Yes, sir.

Q. What?

A. I used to go out and set the switches in the yard.

Q. In what yard, in what part of the yard?

A. In the cornfield.

57 Q. Was the same tracks used to put the buggy on always?

A. No, not always.

Q. Where was the buggy placed usually?

A. Sometimes on the box shop.

Q. On the box shop track, you mean?

A. On the box shop track.

Q. And is that west or east of the main line?

A. That is east.

Q. And when it wasn't put on the box shop track, where was it put?

A. It was kicked down into the yard, if he was going right back.

Q. What part of the yard?

A. Cornfield.

Q. Was that track named in anyway?

A. Why, they went 4, 5, 6, 7 and 8 tracks.

Q. In the cornfield?

A. In the cornfield.

Q. And those are all east of the main line?

A. Those are all east of the main line.

Q. Now, was it your duty to ride the buggy from the cut-off switch

that you have spoken of when it was detached from the train up north and down onto the cornfield tracks?

A. Yes, sir.

Q. Now, what did you have to do? Was it necessary to do anything with relation to setting the switches out on the cornfield tracks?

A. I used to set the switches to let the buggy in on the box shop or out in the cornfield, if we were making up to go back as an extra freight.

Q. You may tell how far it is from the cut-off switch where you would take the buggy, where you would start with the buggy to the cornfield track, where you would leave it?

A. About twenty rods.

Q. In what direction?

A. North.

Q. How would you get over that twenty rods?

A. I would ride on the buggy and when I got where I wanted to get off I would leave the buggy.

Q. Now, where would you naturally, and where did you get off?

Mr. YOUNG: Do you mean this day?

58 Q. Yes, where did you get off this day? Did you ride the buggy up there that day that you were injured?

A. Yes, sir.

Q. Where did you get off?

A. Well, I got off opposite of the box shop switch.

Q. Set that switch?

A. Yes, sir.

Q. And was the buggy put in on the track?

A. Yes, sir.

Q. Did you ride it in there?

A. Yes, sir.

Q. I think you said something about kicking the buggy in there?

A. Yes.

Q. Tell the jury how that is done?

A. Well, Mr. Kendall would pull the pin on the buggy——

Q. Pull the pin between the engine and the buggy?

A. Between the engine and the buggy and would give it what they call a "kick."

Q. The engineer would do that?

A. Yes, the engineer would start the engine to going rapidly and then he would stop and I would get onto the buggy and ride it in, put up a brake on it.

Q. Now in doing that work, would you use the switch that you were injured on?

A. Mr. Kendall would use it.

Q. I am asking you if you would use it?

A No, sir.

Q. Now, how fast were these cars moving when you mounted them to let off the brake and were injured?

A. Two or three miles an hour.

Q. Now, you tell the jury where the ladder was located on that car that you——

A. It was located on the north end of the car.

Q. And on which side of the car?

A. On the east side.

Q. Whether that was the side that you were on?

A. That was the side I was on.

Q. Now, is there another ladder on the same car?

A. Yes, sir.

59 Q. Where is that?

A. That is on the other side of the car, on the other end.

Q. On the other end of the car and other side?

A. Other side.

Q. Now, where was the brake, which end of the car was the brake on?

A. On the hind end.

Q. Why couldn't you have mounted that car at the hind end instead of the forward end, as you have said?

A. Well, the ladder was on the opposite side of the car.

Q. Ladder was on the wrong side?

A. On the wrong side.

Q. Now, what was the rules of the Company with reference to squealing brakes, as you referred to?

Mr. YOUNG: The rules of the company are all in printing.

Q. Had you received some directions from the men you were working under with relation to what would be done when the brakes were set up?

Mr. YOUNG: That we object to, if the Court please. There are none of those trainmen who have any authority to suspend or change the rules. They are on print and furnished to every trainman, and each trainman is bound by the printed rules that are furnished him.

Mr. HOWE: There is no evidence of that fact, your Honor.

The COURT: What is your question?

Mr. HOWE: I asked him if he had received some directions from the men he was working under.

The COURT: You mean, generally, when they noticed a brake squealing?

Mr. HOWE: Yes, what it was his duty to do.

The COURT: I think you may take that.

Mr. YOUNG: We would like an exception to that for the reason that the rules were all in print and furnished, and if the Court will permit we would like to ask this particular witness, before it

60 is taken, if he was furnished with a copy of the rules or instructions of brakemen before that?

The COURT: We will leave the cross-examination until we get through with the examination in chief. You may answer that particular question.

Mr. YOUNG: We would like an exception to the admission of it, your Honor, for the rules are in printing.

Mr. HOWE: I will withdraw that particular question.

Q. Now, I ask you, Mr. Gokey, if you had received directions what to do in case you noticed a brake squealing?

A. Well, we was to let the brake off.

Mr. YOUNG: We object to proving by this witness the contents of the printed rules. They were furnished him by the Company.

The COURT: I don't understand he has asked him about the contents of the printed rules, whether he had had any directions if a brake was squealing to do something about it.

Mr. YOUNG: We object to any parole evidence as to the instructions in that condition, and desire an exception, if the Court please.

The COURT: We are not dealing with the rules of the company, but with the directions of men about if they observed a thing of that sort.

Mr. YOUNG: We want an exception to the admission of any parole evidence as to the instructions of the different members of these crews to each other about the handling of those cars and brakes.

The COURT: We will receive this—the direction from the railroad, from the men, his superiors.

Mr. YOUNG: We want an exception to that.

The COURT: We will note it.

Exception.

61 Q. Now, did you mount this car at the time just before you were injured for any other purpose?

(WITNESS:) No, sir.

COUNSEL: Than to let the brake off?

(WITNESS:) Than to let the brake off.

Q. Was it any part of your duty, Mr. Gokey, to assist in making up trains?

A. Yes, sir.

Q. And in making up trains what tracks were used?

A. We used the cornfield tracks.

Q. Did you ever use track No. 1 after the switch was moved over there when you were making up trains?

A. No, sir.

Q. Now, did you do any other work in the Lyndonville yard after this switch was moved to the point where it was when you were injured except the hauling in of your trains and making up of your trains on the cornfield track?

A. No, sir.

Q. Now, had you received any notice or warning from the railroad company as to the danger of this switch-staff?

Mr. GEO. YOUNG: We object to that. It was in plain view, he says, and he hasn't shown any obstruction or anything tending to obstruction, but he could see it just as well as any employee of the corporation or any director, not a scintilla of evidence yet that there was anything that obstructed his seeing just where it stood.

The COURT: That is all plain enough. The question is whether his attention had been called to it, I understand.

Mr. YOUNG: We submit that it is not necessary when a thing is perfectly plain and an employee can see it.

The COURT: At the same time we can hear the evidence, that may be a matter of argument.

62 Mr. YOUNG: We submit it as a matter of law, your Honor.

The COURT: It is a matter of law to find out the facts as far as we can. If he had received any information about it, all right; if he hadn't, all right.

Mr. YOUNG: We would like an exception to this question.

Exception.

Mr. HOWE:

Q. You may answer that question.

A. No, sir.

Q. Now, I want to have you tell whether you had received any notice and warning from the railroad company as to certain other switches being so near the track as to be dangerous?

Mr. YOUNG: That, if the Court please, we object to.

Mr. HOWE: I think that is admissible, because if they had pointed out certain switches to him that were dangerous——

The COURT: Right down in that yard?

Mr. HOWE: No, not in that yard, but in the other yards where he was working.

The COURT: On the line from here to Lyndonville?

Mr. HOWE: Yes, your Honor.

The COURT: Well, we will leave that out.

Q. Now, I want to have you tell whether you believed this switch to be so located as to be safe or dangerous?

Mr. YOUNG: That we object to, if the Court please. It is asking for his belief, no way of anybody knowing anything else about it.

The COURT: You mean what he thought in his mind?

63 Mr. HOWE: Yes, your Honor.

The COURT: Did he think anything about it?

Mr. HOWE: I think he did.

The COURT: He may answer that.

Exception.

A. I believed it was safe.

Q. Now, had you observed this switch-staff before you were injured with reference to the main line?

A. Yes, sir.

Q. And what was you doing; you say you never have operated the switch. Where were you and what was you doing when you noticed that the switch had been changed over to this point just west of the main line?

A. We were drawing in.

Q. Drawing into Lyndonville?

A. On the main line.

Q. Now, John, I want to have you tell the jury whether the

switch is constructed so as to be farther away from the main line than it is away from track No. 1?

A. It is farther away from the main line than it is from track No. 1.

Q. Now, you tell the jury whether you had ever observed this switch with reference to the track No. 1 when there was a car passing by on track No. 1?

A. No, sir.

Q. Or when there was a car standing opposite the switch on track No. 1?

A. No, sir.

Q. Now, I want to have you describe to the jury, if you can, a little more fully just what position your body was in on the end and side of the car at the time you were struck by the switch, whether you were standing up straight or whether your body was bent?

A. My body was bent. I was swinging around the end of the car to take the ladder.

Q. Now, what part of your person projected out farthest?

A. My hip.

64 Q. Now, in climbing onto a car that is passing by, what place do you take hold of first in getting on?

A. The grab handle.

Q. Now, you tell the jury whether you have to reach up high to get hold of that?

A. Yes. You have to reach up pretty well, reach up as high as that (indicating).

Q. Now, when you reach for the grab-iron what next do you do?

A. Put your foot into the stirrup.

Q. Now, when you want to get onto this train that was passing by there, were you standing still when you reached up, or were you moving along?

A. I was standing still.

Q. Just where is the grab-iron on the car?

A. On the side of the car.

Q. And near the end?

A. Right close to the end.

Q. Now, where is the stirrup with reference to the grab-iron?

A. It is under the car sill opposite the grab-iron.

The COURT: On the side or end?

A. On the side.

Q. Now, in getting onto that car there putting your foot into the stirrup and one hand in the grab-iron and one hand on the ladder, would your body swing out in a curved position?

A. Yes.

Q. And would that be the natural position in mounting the car?

A. Yes.

Q. Now, I want to have you remove your artificial limb, if you can, so that we can see how you have to wear it, and the jury may see.

The COURT: Perhaps you better finish the examination.

Q. Now, John, before this switch had been changed had you ridden by it on the side of a car?

A. Yes, sir.

Q. And how was it with reference to being at a safe distance?

A. It was perfectly safe.

65 Mr. GEO. YOUNG: We object to that.

The COURT: Where it stood before?

Mr. HOWE: Yes, your Honor.

Mr. GEO. YOUNG: The Court will allow us an exception to the question.

The COURT: Note — is objected to and admitted, and an exception as to where the switch stood on the other side, whether it was a safe distance before it was moved to the other side.

Exception by the defendant.

Q. Now, Mr. Gokey, you say you believed this switch was safe when riding by it on track No. 1? Now, what made you believe it was safe?

Objected to.

The COURT: What he may believe may take a wide range.

Mr. HOWE: I will omit that for now. We think that is all.

The COURT: Cross-examine and then, if you think it material afterwards to show his foot and ankle to the jury, why, that can be done. We won't stop now.

Cross-examination by Mr. GEO. B. YOUNG:

Q. Mr. Gokey, you say you began working on the railroad in 1894?

A. About that time.

Q. Where did you run?

A. My first run was from Newport to Sherbrooke.

Q. How long did you continue on the run from Newport to Sherbrooke?

A. Well, about a year.

Q. And you ran as a brakeman on a freight train during that year?

A. Yes, sir.

Q. And about how steady did you work during that time?

A. I worked all the time.

Q. Every day?

A. Every day.

Q. After that year where did you run?

A. I ran from Newport to Sherbrooke.

66 Q. After that year was over?

A. Yes.

Q. You said you ran north for a year?

A. On one train, I shifted trains afterwards.

Q. You changed trains?

A. Changed trains.

Q. What did you run on after that first year?

A. It was an extra freight train.
Q. Still running to Sherbrooke?
A. Still running to Sherbrooke.
Q. That is north from Newport?
A. North.
Q. How long did you run on any freight train from Newport to Sherbrooke?
A. Well, about two and a half——
Q. What did you do then?
A. I was braking from Newport to Lyndonville.
Q. You ran as a brakeman on a freight train all the time that you ran from Newport to Sherbrooke, did you?
A. Yes, sir.
Q. Then you began running to Lyndonville?
A. Yes, sir.
Q. That was south from here?
A. Yes, sir.
Q. How long did you continue as a freight brakeman on the run from Newport to Lyndonville?
A. About six months.
Q. What did you do then?
A. I was injured.
Q. And you left the service for a time?
A. Two years.
Q. Up to the time that you left the service you had been running about three years?
A. About three years.
Q. And during that three years you had run practically every day?
A. Most every day.
Q. As a brakeman on a freight train?
A. Yes, sir.
Q. After the two years' absence you again came into the service of the Boston & Maine road, did you?
A. Yes, sir.
Q. As a freight brakeman?
A. Yes, sir.
67 Q. And what was your run then?
A. My first run was from Newport to Sherbrooke.
Q. How long did you continue on that run?
A. About three months.
Q. Then where did you go?
A. From Newport to Lyndonville.
Q. And how long did you continue to run from Newport to Lyndonville?
A. Until I was injured.
Q. And that was about how long?
A. Well, about nineteen months; a little more, perhaps.
Q. About two years, wasn't it?
A. Just about.

Q. During that two years you ran as a freight brakeman from Newport to Lyndonville and return practically every working day?

A. Not during two years.

Q. During the nineteen months?

A. During the nineteen months.

Q. What did you run on from Newport to Lyndonville during the last nineteen months that you run?

A. I ran on train No. 72.

Q. That was going down, and what was that train coming back?

A. The train coming back, when we come back on it, was No. 87.

Q. And you ran on those trains up and down nineteen months prior to your accident?

A. Yes, sir.

Q. Practically every day.

A. Practically every day.

Q. As a freight brakeman?

A. Yes, sir.

Q. During all of that time it was a part of your duty to assist in making up the train that you brought to Newport, there in the Lyndonville yard?

A. Yes, sir.

Q. That portion of the Lyndonville yard lying east of the main line is known as the cornfield?

A. Yes, sir.

Q. And in that cornfield is a track known as the box-shop track, is there?

A. Yes, sir.

68 Q. During the first year or more that you were running there in the last run before you were hurt there were two or three switches that lead into the cornfield from the main line, were there not?

A. Yes, sir.

Q. And some time before you were hurt that yard was somewhat rearranged in the cornfield, was it not? They put in a ladder track, didn't they? Sometime before you were injured they remodeled the cornfield tracks to some extent, putting in a ladder track, changed it, put in a ladder track there?

A. I don't remember that they did.

Q. You knew of their changing this switch that you were injured on?

A. Yes.

Q. At that time didn't they put in a ladder track?

A. I don't remember.

Q. And that was the switch which let the train onto the ladder track, wasn't it? That switch that you was hurt on was the switch which led onto the ladder track, wasn't it?

A. That switch that I was hurt on led into the cornfield.

Q. And it led into the track from which all these tracks in the cornfield led off from, didn't it?

A. Yes, sir.

Q. Had that arrangement existed during all the time that you were running in the Lyndonville yard?

A. Yes, sir.

Q. That track had been there just the same?

A. You mean that——

Q. I mean that the track from the switch that you was hurt by down in the cornfield had been just the same all the time that you had run into that yard; that is, it left the main line at the same place and the tracks leading from it led off from it in the same way during all that time, do you understand?

A. No, I don't understand your meaning.

69 Q. Before this switch was changed on which you were hurt could you get into the cornfield by more than one track leading from the main line?

A. No, sir.

Q. You couldn't?

A. Not at that end of the yard.

Q. Well, down anywhere between there and the water tank, for instance?

A. No, sir.

Q. And had there been any time for a year or two before that that there was more than one track leading from the north into the cornfield?

A. Into the cornfield?

Q. Yes.

A. No, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Was any change made in the tracks in the cornfield when this switch was changed?

A. No, sir.

Q. You are sure of that?

A. I am sure of it.

Q. Do you know what a ladder track is?

A. A ladder track?

Q. Yes.

A. No, sir.

Q. You never heard that expression?

A. No, sir.

Q. You always went into that cornfield siding over this same track which was controlled by the switch that you were hurt on during all the time that you worked in the Lyndonville yard?

A. I didn't understand.

Q. During all the time that you worked in the Lyndonville yard you went into the cornfield from the north over the track that was operated by the switch that hurt you?

A. We went in that way.

Q. Was there any other way to get in there?

A. There was at the other end of the yard.

Q. Where did you come in from the other end of the yard?

A. Opposite the station.

Q. And those were the only two ways of getting in there, was it?
A. Yes, sir.
Q. Any time while you ran into the Lyndonville yard?
A. Yes, sir.
70 Q. You are sure of that?
A. Yes, sir.
Q. Where did this switch stand before it was changed?
A. It stood on the east side of the track.
Q. East side of which track?
A. Of the main line.
Q. Between the main line and what?
A. And the coal-chute track.
Q. Where is there the most room at that point, between the main line and the coal-chute track or the main line and No. 1?
A. I should say there is the most room between the main line and the coal-chute.
Q. Which side of the main line is the coal-chute track?
A. It is on the east side of the main line.
Q. Did you know that there was about a foot and a half or two feet less room between the coal-chute track and the main line than there is between the main line and No. 1 at that point?
A. No, I didn't.
Q. Do you know anything about it?
A. Why, I am just giving you my estimation.
Q. You never measured it?
A. No, sir.
Q. And you feel quite confident that you couldn't get into the cornfield any time while you worked there from the north except at this point where this switch was located?
A. I am sure of it.
Q. Then, as you were making up trains there in that yard during that year and a half you always went into the cornfield over that same track?
A. Yes, sir.
Q. Now, this track that led off from the main line that you have been referring to, when it came along a little, there was a track branching off from that track, wasn't there, down into the cornfield, going into the cornfield?
A. Yes, sir.
Q. After leaving the main line you ran along this track a little ways and you came to a track that ran off from it into the cornfield?
A. Yes, sir.
71 Q. Then you went along a little farther and another track ran off from it on the same side into the cornfield?
A. Yes, sir.
Q. And you went along a little farther and another track led off?
A. Yes, sir.
Q. And so on, until you got all the tracks in the cornfield that lead off from this track?
A. Yes, sir.
Q. Now, you don't know what that straight track from which all these other tracks lead is called, do you?

A. No, I don't.

Q. You never heard the term "ladder track" applied to that arrangement or to that track?

A. No, sir.

Q. But you are sure that the way you got onto all those tracks in the cornfield during this year and a half that you was running there was in just this way, by going in onto this track and then from it onto each of the other tracks?

A. You mean from the main line?

Q. You left this track that started from the main line and went onto that and from that you went directly onto each of the other tracks?

A. Yes, sir.

Q. And that was the only way to get onto those other tracks from that end?

A. Yes, sir.

Q. And you are sure that none of those other tracks at any time during that year and a half lead off from the main line?

A. I didn't understand your meaning.

Q. I say that none of those tracks in the cornfield except this one lead directly from the main line any time while you was there?

A. No, sir.

Q. And there was no other track leading from the main line that ran across those tracks from the north?

A. No, sir.

Q. When you went into Lyndonville yard you usually
72 pulled down onto this No. 1, did you not?

A. We used to pull in onto No. 1.

Q. And was the No. 1 during all the time that you were running into that yard just the same as it was when you were hurt?

A. Yes, sir.

Q. Just the same length?

A. Yes, sir.

Q. Came in at the same place?

A. Yes, sir.

Q. Was there any name applied to the two ends of that track to distinguish them, the north end—was there any name which you railroad men applied to the north end of that track, that No. 1 track, to distinguish it from the No. 1 track at the south end?

A. Why, not that I remember; there was no name.

Q. They didn't use to call one end the "New No. 1" and the other end the "Old No. 1," did they, while you were there?

A. I never heard it.

Q. You never heard that?

A. Never heard that called that way.

Q. The switch down near the water-tank, or just below it, south from it, you called the stub switch, cut-off switch?

A. The cut-off switch.

Q. That is a square end switch?

A. Well, it is the switch that cuts off from the main line and cuts in onto the siding.

Q. The end of the rails are cut square so that the rails move right up against the end of the switch?

A. Yes, sir.

Q. Now, the switch up at the other end is of a different kind. That is a split rail up there, isn't it, at the north end of No. 1?

A. If I remember it is a split switch.

Q. And it was a split switch that went into the cornfield, was it not?

A. After it was changed over.

Q. When your train used to go into the Lyndonville yard you pulled in onto No. 1?

A. Yes, sir.

Q. You were head brakeman?

A. Yes, sir.

73 Q. And you cut off the engine?

A. Yes, sir.

Q. And went down into the main line at the south end of No. 1, did you?

A. Yes, sir.

Q. And came up this switch that you went into No. 1 over?

A. Yes, sir.

Q. And that is right near the water tank?

A. Yes, sir, a little above the water tank.

Q. That is a little north of the water tank?

A. A little south.

Q. And who set that—that switch would be all right for you to go in on, would it, when you got up there? Did Kendall set that switch to let you in onto the buggy?

A. Yes, sir.

Q. Who coupled onto the buggy, you or Kendall?

A. I did.

Q. Where did Mr. Kendall go while you were coupling onto the buggy?

A. He used to stay by the switch.

Q. And after you pulled out he set that switch, did he?

A. Set it back.

Q. And you rode up to this cornfield switch?

A. I rode up a piece on the buggy.

Q. Didn't you ride up and ride the buggy all the way until it was kicked in there, and didn't Mr. Kendall go across from this stub switch and set the switch onto the box-shop?

A. No, sir.

Q. Where did you get off from the buggy?

A. Well, that would depend on where we was going to set the buggy.

Q. Supposing you were going to throw it onto the box-shop track?

A. I would get off opposite the box-shop switch.

Q. How far was that north of the switch to the No. 1 track that you have mentioned?

A. The switch I was injured on?

Q. No, that is not the No. 1 track switch, was it? Was
74 you injured on the switch to the No. 1 track?

A. No, I was injured on the switch to the main line that leads into the cornfield.

Q. My question is, how far north of the switch leading to No. 1 that you took the buggy out over, how far north of that switch was this box shop switch?

A. Oh, it might be between twenty, twenty-five or thirty rods somewhere around in there.

Q. Do you think it was as far as that?

A. I do.

Q. North?

A. Yes.

Q. How far was it over from the main line to it?

A. About six rods, six or eight rods.

Q. How far was it from that box shop switch to the switch you were hurt on, the target you were hurt by?

A. About fifteen rods.

Q. In making up your trains in the cornfield did you run over this switch to the cornfield, go out onto the main line?

A. When we pulled out to go home.

Q. In making up your trains didn't you very frequently pull out over that switch?

A. We used to pull out to do our shifting.

Q. In doing your shifting, that is what I mean?

A. Yes.

Q. In making up your train in the cornfield you go out onto the main line almost every time you changed tracks, didn't you?

A. Yes, go out onto the main line part way.

Q. Enough so that you would have to set this switch?

A. Yes.

Q. And that continued to be the method in using the cornfield siding all the time that you were working in the Lyndonville yard?

A. Yes, sir.

Q. So that about every movement that you made in making up the trains your train crew, or rather a part of the train, would have to go over to that swtich, so that it would have to be set and thrown back?

A. Yes, sir.

Q. And you, in the making up of those trains very fre-
75 quently set that switch, didn't you?

A. Not after it was moved over.

Q. I am speaking about before the change?

A. Well, I did occasionally.

Q. Most every day, didn't you?

A. No, sir.

Q. How did it happen that you didn't ever set that switch?

A. Mr. Kendall was the head brakeman and he had charge of the switch.

Q. And you did the other work down in the yard?

A. I was the rear brakeman.

Q. Now, how often do you suppose you set that switch before it was changed?

A. Well, in the nineteen months' time I might have set it a half dozen times.

Q. Do you think you did set it as many as that, Mr. Gokey?

A. I presume I did.

Q. You would be pretty sure of that?

A. Well, I ain't positive.

Q. Will you be sure that you ever set that switch?

A. Yes, sir.

Q. How many times would you be absolutely certain that you set that switch during the nineteen months?

A. I am not absolutely certain on any number of times.

Q. But you would be sure that you had set it once during that time?

A. Yes, sir.

Q. You had noticed this switch after it was changed?

A. Yes, sir.

Q. You noticed its location with reference to the main line?

A. Yes, sir.

Q. And you had seen the No. 1 track, I suppose?

A. Yes, sir.

Q. When you looked at the switch and noticed the distance from the main line, did you see the No. 1 track?

A. Could I see it?

Q. Yes.

A. Yes, sir.

Q. And they stood right there together, didn't they?

A. Yes, sir.

76 Q. And that switch stood right between them?

A. Yes, sir.

Q. And when you was looking at the distance of that switch from No. 1 track you looked at the distance from the other track, didn't you?

A. Yes, sir.

Q. And you noticed the distance that that switch was from each of these tracks?

Q. And you determined that it was a safe distance from the main line, did you?

A. Yes, sir.

Q. And you thought it was a safe distance from the No. 1?

A. Yes, sir.

Q. Now, on the morning of the accident, when you mounted that car, you had that switch in mind, didn't you?

A. No, sir.

Q. And you had in mind that that switch was a safe distance from the side of the car, didn't you?

A. I supposed that it was safe.

Q. You thought of it at the time, didn't you, and supposed it was safe?

A. I supposed it was safe.

Q. At that time?
A. At that time.
Q. And you had it in mind at that time that it was safe, didn't you?
A. No, sir; I didn't.
Q. You was about two or three rods from it?
A. Yes, about that, a little more, perhaps a little less.
Q. And when you got onto the car you were looking south?
A. I was looking south, that is, I was looking east.
Q. You was looking east?
A. East.
Q. The car that you got onto was west of you?
A. Yes, sir.
Q. And when you got onto that car you was looking east?
A. I was looking south when I got onto that car.
Q. You was looking south. Had you looked north any time as you came up to get onto that car?
A. No, sir.
77 Q. You had looked south all the time?
A. No, sir, I had looked west.
Q. You had looked west?
A. Yes, sir.
Q. Directly at the cars?
A. I looked at the cars, yes.
Q. Now, on that day, Mr. Gokey, I wish you would tell me just how you moved that train after you pulled into the Lyndonville yard, the day of the accident—just what you did.
A. Well, I couldn't tell you; I don't remember.
Q. Well, I want your best recollection about it. You say you don't remember what you did on that day, the movements?
A. I don't remember all.
Q. Well, tell us what you do remember.
A. Well, I remember of taking the buggy and setting it off.
Q. Where did you set it that day?
A. I think we set it onto the box-shop track.
Q. And where did you get off from the buggy that day after you brought it off from the No. 1 track?
A. I got off opposite the box-shop track.
Q. You are sure of that?
A. Yes, sir.
Q. You went over and set the switch for the box-shop?
A. Yes, sir.
Q. Where did you catch the buggy?
A. I caught it above the box-shop track, north of the box-shop track.
Q. How far?
A. Three or four rods, perhaps; somewhere around in there.
Q. About what time was that?
A. Well, I don't remember. It was between eight and ten o'clock in the forenoon.

Q. Now, where were you coming from at the time that you went over and got onto these cars?

A. Onto which track, please?

Q. On the No. 1?

A. I was coming from the caboose.

Q. What had you been doing in the caboose just before that?

A. I had been riding it down into the yard. I had rode
78 the caboose and cars down into the yard.

Q. Just before that?

A. Yes.

Q. Well, you had moved the caboose some then since you first set it in onto the box-shop in the morning?

A. Yes, sir.

Q. Where was the caboose standing at the time you set it?

A. Well, I don't remember on which track it was standing, but it wasn't very far from the north end of the yard.

Q. Up pretty close to the coal-chute?

A. Oh, no.

Q. That is the north end of the yard, isn't it?

A. It was between the switch on one of those tracks and the ladder track.

Q. How many cars were there ahead of it, between it and the ladder track?

A. I think there was two cars ahead of the buggy, the caboose.

Q. About what time was it when you left that caboose on that occasion to go over to those cars?

A. Between two and half-past two.

Q. What kind of a day was it?

A. I don't remember.

Q. Remember whether it was raining or whether the sun was shining?

A. No, sir.

Q. You couldn't say as to that?

A. I couldn't say.

Q. Have you any recollection that it was raining?

A. No, I haven't.

Q. How was this switch target set as you went over there?

A. Well, I suppose it was set crossways.

Q. Do you know anything about it?

A. No, sir; I don't.

Q. Did you look in the direction that the train was moving from the time you left the buggy until you go- on to that car?

A. No, sir.

Q. You carefully looked south all the way across?

79 A. I didn't carefully look south. I looked across at the cars.

Q. You looked south and west?

A. South and west.

Q. And east?

A. And east.

Q. But you didn't look north?

A. No, sir.

Q. Though you were going north?
A. We were going north.
Q. And would pass over the switches to the north of you first, and if there were any switches that needed to be looked after they were the switches to the north of you, weren't they?
A. Yes, sir.
Q. And yet you didn't look in that direction?
A. No, sir.
Q. Do you know of anything which would have prevented your seeing this switch target that you were hurt by any time from the time you left the buggy until you were hurt, if you had looked in its direction?
A. Well, if I had been warned——
Q. Note my question. If you had looked in the direction of that switch target any time from the time you left the buggy to go to those cars on the No. 1 siding, couldn't you have seen that switch target if you had looked?
A. Yes, sir.
Q. And you didn't look?
A. No, sir.
Q. And it was in broad daylight?
A. Yes, sir.
Q. At the time that you struck that switch target it stood crossways between those two tracks, didn't it, the widest way?
A. I don't know.
Q. You never noticed that?
A. I didn't notice that.
Q. You say you got on to the north end of the rear car?
A. I got on to the north end of the rear car.
Q. How high is the grab-iron from the ground, or was it on that car?
A. I don't know.
Q. Any idea?
A. About five to *five to* six feet.
80 Q. How tall are you?
A. I am five foot ten inches.
Q. You would have to reach up above your head to reach that grab-iron?
A. Some.
Q. How high is the floor of the car, above the rail; have you any idea?
A. It is—no, I haven't any idea just now. It is about thirty inches, some such thing, about three feet.
Q. And you think the grab-iron is how far above that?
A. About two feet.
Q. And does that grab-iron run up and down or horizontal?
A. You mean on that car?
Q. Yes.
A. Horizontal.
Q. Were the other stock-racks that were on that track of exactly the same kind and size?

A. I think they were.
Q. How did you say that grab-iron ran?
A. Horizontal.
Q. Are you sure?
A. I am sure of it.
Q. On that car?
A. On that car.
Q. Did they run that way on most of those stock cars?
A. They do, or they did, rather.
Q. Did they have any grab-irons on those cars that ran up and down, on this car, this car that you were hurt on?
WITNESS: Do you mean was there any grab-irons?
COUNSEL: Grab-irons that ran up and down, up this way (indicating).
A. No, sir.
Q. They ran like this? (Indicating.)
A. Yes, sir.
Q. Do you remember the number of the car that you was hurt on?
A. No, sir, I can't.
Q. Have no idea abou- that?
A. No, sir.
Q. You don't think there is any question but what if you had looked in the direction of that switch target before you got onto the car you could — seen it, could you?
A. I could have seen the target.
81 Q. Seen the target?
A. Yes, sir.
Q. About how big is that target?
A. Well, it is about two feet one way by about fifteen or eighteen inches the other.
Q. Painted red?
A. Painted red.
Q. Where is the grab-iron located with reference to the stirrup?
A. It was located above the stirrup.
Q. Directly above it?
A. Very near it.
Q. And the stirrup is under the sill of the car?
A. Yes, sir.
Q. About how far below the sill of the car should you think it would come down?
A. About seven inches.
Q. How did it set on that car with reference to being even with the outside of the car—was it even with the outside of the car, or did it set under a little?
A. I don't remember.
Q. There was an end ladder?
A. Yes, sir.
Q. No side ladder?
A. No side ladder.
Q. Where were you when Mr. Davidson gave you the directions that you say he gave with reference to these cars on the No. 1 siding?

A. I was in the cornfield.
Q. Whereabouts in the cornfield?
A. Well, just a little west from the caboose.
Q. Was that before or after you rode the caboose down there the last time before the accident?
A. It was after I rode the caboose in.
Q. And was Mr. Kendall then with the engine and over on this No. 1 track?
A. He was going over there.
Q. You don't know whether he had reached there or not?
A. No, sir.
Q. You say that the only reason for your getting onto that car at that time was to unfasten this brake?
A. My only reason for getting up where I did was to let the brake off.
82 Q. And did you know that at that time Mr. Kendall was on the top of that car?
A. No, sir.
Q. Did you know whether he was or was not?
A. No, sir.
Q. Did you look up onto the top of the car to see?
A. No, sir.
Q. You simply heard that brake and without making any effort to determine whether there was a man on the car or not, or how near you were to the switch, you looked south and climbed up?
A. I looked south and jumped onto the car to get up and let the brake off. I looked south to see which car it was that was squealing, which brake it was.
Q. How far from this switch-stand were you when you crossed the main line?
A. Three or four rods, perhaps.
Q. When you were crossing the main line you didn't look north?
A. No, sir.
Q. How long before this accident was it that you were looking at this switch stand and observing its distance from the main line and from No. 1?
A. Well, I wasn't looking at it very close by. I looked at it when we drawed by in the morning on the train.
Q. That same morning?
A. That same morning I was on top of the car.
Q. And you looked down as you went by it?
A. I looked down as we went by it.
Q. So that you observed the distance between that switch and the main line as you passed it that very morning?
A. Yes.
Q. Had you ever observed it before that?
A. No, sir.
Q. How long before that was that switch changed?
WITNESS: When I observed it?
COUNSEL: I ask if you know how long before the day of the ac-

cident that switch was changed from the east side of the main
83 line to where it stood when you were hurt?

A. Well, I should say about two or three weeks.

Q. Wasn't it four to six weeks?

A. No, sir.

Q. Did you testify before the railroad commission with relation to this accident very shortly after the accident happened?

A. Yes, sir.

Q. Did you then state that that switch was changed some four or six weeks before?

A. No, sir.

Q. You are sure of that, are you?

A. I am.

Q. Did Judge Ross ask you this questoin: "How familiar was you with that yard and that switch?" and did you answer: "Well, that switch had been changed as I remember, if I remember right, from one side to the other. It might have been a month or six weeks before, I am not positive. It might have been along there anywhere." Did you make that answer?

A. I did if you have got it down there.

Q. You think you did so answer that question?

A. I did if you have got it down.

By the COURT: What do you remember now, to say nothing about what he has got down?

Mr. YOUNG: What do you say?

A. I don't remember that I ever made that answer.

Q. What do you say as to the fact, as to whether that was changed a month or six weeks before?

A. I should say that I don't think it was so long as that.

Q. That examination that was made by Judge Ross was made in the office of Young & Young here in Newport?

A. Yes, sir.

Q. Do you remember who was present?

A. Myself, Mr. Davidson, Mr. Shattuck, Mr. Green and Mr. Kendall, and I think you was present and Judge Ross.

Q. Do you remember John Cattanach, who was in our
84 office at that time, the stenographer?

A. Yes, sir.

Q. Do you remember that he took the testimony that night?

A. Yes, sir.

Q. Now, you say that when you were riding that car in there you had in mind that that switch was safe?

A. Yes, sir.

Q. And for that reason you didn't look that way?

A. No, sir.

Q. You didn't look that way?

A. No, sir.

Q. During the time that the buggy was standing over there on the box-shop track while you were not doing any work, before the engine came out, do you remember what you were doing?

A. I was sleeping.

Q. Do you remember doing anything to your foot there in the buggy that forenoon?

A. No, sir.

Q. You had had considerable trouble with your foot before that accident, had you not?

A. Yes, sir.

Q. And were pretty lame?

A. No, sir.

Q. At times?

A. No, sir, I had a corn on my foot that bothered me at times, that would bother me on my big toe.

Q. And that was the only trouble with your foot, the only thing that affected your using it?

A. Yes, sir, with the exception that the leg was a little mite shorter than the other and it give me a hitch.

Q. Since the accident, Mr. Gokey, what have you been doing?

A. Well, there was thirteen months that I didn't do anything.

Q. Well, since that what have you been doing?

A. I have been working for Fairbrother & Gale.

Q. What have you been doing there?

A. I have been working in the carriage shop.

Q. What kind of work have you been doing, woodwork or ironwork?

A. Woodwork, carriage work.

85 Q. Did you have to do with running the engine there for a time?

A. Yes, sir.

Q. Firing?

A. Yes, sir.

Q. During the last six months how much time have you put in?

WITNESS: At Fairbrother & Gale's?

COUNSEL: Yes.

A. Well, I have worked practically every day.

Q. How was it the six months before that?

A. I worked practically all the time.

Q. You are working as a carpenter there, or wheelwright, carriage maker?

A. Carriage maker, yes, sir.

Q. How long have you been working for Fairbrother & Gale as a carriage maker?

A. I have been working for them about two years and a half.

Q. During that time have you been able to work practically every day?

A. I have been obliged to work practically every day.

Q. Have you worked practically every day?

A. I have.

Q. And you have put in practically full time?

A. Very near it.

Q. You say your leg was amputated about three inches above the ankle?

A. About that.

Q. Have you any idea what that portion of the leg or foot below that amputation would weigh, the weight of it?

A. Do you mean the stump itself?

Q. Yes, I mean the part that was cut off. How much would that part of your leg have weighed if it was there?

A. I haven't any idea.

Q. Mr. Gokey, how far do you think that switch-stand stood from the main line at the time of your accident?

A. Well, about fifty-seven inches.

Q. Fifty-seven?

A. Fifty-seven or fifty-eight inches.

86 Q. And that was to the center of the switch-stand?

A. The center of the switch-stand.

Q. And about how far was it from the No. 1 track?

A. About forty-seven inches.

Q. That is also to the center of the switch-stand?

A. Yes.

Q. That is the way that switch stood at the time of the accident, you think?

A. Yes, sir.

Q. And you had noticed that before so as to observe and have the judgment that that was about the distance, had you?

A. I had noticed that it was a little nearer on one side than it was on the other.

Q. You had noticed that it stood nearer to No. 1 than to the main line?

A. Yes, sir.

Q. And some ten or twelve inches nearer?

A. Well, I hadn't noticed it at that time, not how much.

Q. But you had noticed that it was some nearer?

A. A little mite.

Redirect examination by Mr. HOWE:

Q. Mr. Gokey, you say you work at carriage work now?

A. Yes, sir.

Q. Have you learned that trade since?

A. I learned it since I been off the road.

Q. How much pay are you able to get now?

A. $10.50 a week.

Q. How much were you able to get when you first went to work?

A. $1.50 a day.

Q. Now, what pay were you getting from the railroad company when you were injured?

A. I was getting $1.85 a day.

Q. How far along were you with reference to becoming a conductor?

Mr. YOUNG: We object to that, if the Court please. This man don't know whether he would ever been a conductor no more

87 than your Honor or I do. He had been five years a brakeman.

Mr. HOWE: I will ask him what the company told him, if any-

thing. That must be admissible, your Honor, what the company told him with reference to when he would become a conductor.

Mr. YOUNG: There is no evidence in this case that all brakemen are promoted to become conductors, any more than all lawyers become judges.

Mr. HOWE: He had his chances to get to be a conductor if he stuck to, and that is the same as anybody has. What the company had told him with reference to when he should become a conductor, what his turn was, and whether he was the next man. We offer to show that they had told him that he would be the next man.

Mr. YOUNG: We object to anything that any employee of the corporation said.

The COURT: We will exclude that for now.

Q. Were you present at the switch-stand when some photographs were taken?

A. Yes, sir.

Q. And you tell whether the switch-board was in the same position, location, when the photographs were taken as when you were injured?

A. Yes, sir.

Q. I show you Pl'ff's Ex. No. 1, 2 and 3. You look and see what No. 1 represents.

A. No. 1 represents the switch.

Q. Switch-stand?

A. Switch-stand.

Q. Does it represent it in the same location and position as it was when you were injured?

A. Represents the same location with the switch on the main line.

Q. What does No. 2 represent?

A. No. 2 represents the Boston & Maine stock-rack with myself in the position that I was in when I was injured.

Q. Now, what does No. 3 represent.

88 A. No. 3 represents the switch that I was injured on with the switch set right for the cornfield.

Q. What does No. 4 represent?

A. No. 4 represents the ground switch.

Q. And is that the switch that you call the cut-off switch that goes in onto the main line?

A. No, sir.

Q. What does No. 5 represent?

A. No. 5 represents the switch that I was injured on set for the cornfield.

Q. Now, you said you had noticed this switch stand with reference to its distance from the main line?

A. Yes, sir.

Q. And Mr. Young asked you if you had noticed that it was nearer No. 1 than the main line at the time you were injured?

A. Yes, sir.

Q. Did you mean that?

A. Yes, sir.

Q. Before you were injured had you noticed that it was located nearer No. 1 than the main line?

Mr. YOUNG: We object to that question as being leading and suggestive.

Q. When did you notice that it was nearer No. 1 than the main line, whether before or after you was injured?

A. I noticed it when we went down there to take those pictures.

Q. That was after you was injured?

Objected to.

The COURT: That is proper enough to find out whether it is before or after.

Mr. YOUNG: I object to his putting the words into the witness' mouth, the witness said that he noticed it that morning as he went by on the train.

The COURT: I understood it when he went down to take the pictures. I think it is all right to ask that.

89 A. Yes, sir.

The COURT: Which was it, before you was hurt or after you was hurt that you noticed it was nearer?

A. It was after I was hurt.

Mr. HOWE: We offer these photographs if the Court please.

Mr. YOUNG: We object to those photographs until they show where the camera stood and the location of things so that it can be judged what they show there and how they were taken. The location of the camera affects the results very materially.

Mr. HOWE: I think we can show that.

The COURT: I don't think we need the photographs to understand this. I don't think we need them. I think the jury understand all about this just as well without the photographs as with.

Mr. HOWE: Now, I would like to have the witness remove his artificial limb so that the jury can see.

Mr. GEO. YOUNG: We object to the exhibition of the limb.

The COURT: Do you object to his showing where he was hurt? Well, we shall let him.

Mr. GEO. YOUNG: Will the Court allow us an exception?

The COURT: Yes.

Exception.

Q. Now, you tell the jury where it is that the weight of your body is thrown when you are walking.

A. The weight of my body would come—part of the bearing comes up on this part here (indicating). This has to be laced up just as tight as I can bear it, and part of the bearing comes under the knee right here, and the remainder of it comes back in here on the calf of the leg.

90 Q. Now, is your limb smaller than its natural size below the knee?

A. Yes, sir.

Q. You pull up your trousers there and show the jury with reference to that. (Witness complies with request.)

Q. You tell whether there is any soreness created by the artificial limb on any part of the natural limb than the tip, whether the

wearing of that artificial leg makes your leg sore anywhere, except on the end?

The COURT: He has been over that; I think we understand that.

Q. Perhaps you will let the jury heft that and see how heavy and bungling it is.

Mr. GEO. YOUNG: If the Court please, we object to the jury examining the artificial limb.

The COURT: They have already examined it.

Mr. GEO. YOUNG: We object to their passing it around.

The COURT: If you object to it they may take the limb away.

Mr. GEO. YOUNG: If the Court please, before they rest I should like to make one or two more inquiries of Mr. Gokey with reference to the matter they have brought out.

Mr. HOWE: Just one question that I omitted. You have answered Mr. Young that you were looking south and west and east, while you went over there to take out these stock-rack cars; now, why were you looking west, was there any particular reason for you to be looking west?

A. I was looking to see if my switch was right.

Q. Looking west—why were you looking west?

A. I was looking to see which cars we wanted.

91 Recross-examination by Mr. GEO. YOUNG:

Q. When did you first learn that this switch had been changed?

A. Well, I noticed it one morning going down on that main line.

Q. One morning?

A. One morning.

Q. Before the day you was hurt?

A. Oh, no, two or three weeks before I was hurt.

Q. At that time did you notice where it was then, whether it was between the main line and No. 1?

A. I noticed that it was between the main line and No. 1.

Q. Did you then notice anything with relation to its relative position as to the main line and the No. 1 siding? Did you then notice how it stood, how far it was from the main line?

A. Why, I didn't pay particular attention to it when we drawed by.

Q. Did you notice whether it was nearer the main line than No. 1 at that time?

A. I didn't notice at that time, no.

Q. The morning of the accident, when you located the distance between the side of the car and that switch as you testified on the previous examination, did you then notice that it was nearer to the No. 1 than the main line?

WITNESS: The morning of the accident?

COUNSEL: Yes.

A. No, I didn't.

Q. Now, when I asked you before you said you did notice?

A. Yes, but I supposed you had reference to whether I had ever noticed it or not.

Q. My question was directed especially to that morning. Now, had you ever been near that switch before the accident?

A. I had been by it on cars.

Q. On the top of a car on the main line?

A. Yes.

92 Q. Had you ever been to that switch on the ground?

A. No. I had never been up close to it.

Q. And you had never noticed where it stood and how it stood between the tracks?

A. I supposed it stood in the middle of the two tracks.

Q. You had never noticed anything about that?

A. No, sir.

Mr. GEO. YOUNG: I move to strike out that part of that last answer where he said he "supposed" so and so, it is not responsive.

The COURT: We will let that stand.

Mr. GEO. YOUNG: We would like an exception to the refusal to strike it out. It is not responsive.

The COURT: Yes, go on.

Exception.

Q. Now you say that you had never observed that switch but once after it was put onto the west side of the main line until after the accident?

A. I had observed it, but I had never paid no close attention to it.

Q. You had noticed the distance between those two tracks a number of times?

A. I had observed that it was pretty near to the siding.

Q. You had noticed the distance between the two tracks, was my question?

A. No, I didn't.

Q. Those tracks had been just the same all the time you had worked in that yard, hadn't they, No. 1 and the main line?

A. Yes, sir.

Q. And you say in the year and a half you never noticed how far it was between those two tracks?

A. No, sir.

Q. Though you were shifting on those tracks all the time?

WITNESS: On No. 1?

COUNSEL: Yes.

A. No, sir, we had never——

93 Mr. HOWE: I object to Mr. Young's asking a question until he has finished the answer.

The COURT: You have been all through with this.

Mr. GEO. YOUNG: It is a new point brought out by the re-examination whether he had noticed it before or after he was hurt. I understood him to state squarely on my cross-examination that he noticed that this switch was nearer to No. 1 than the main line, and then on Mr. Howe's cross-examination he says he didn't.

The COURT: You are all right about that, so we have let you re-examine him again as to which time it was, but not to go all over the ground.

Mr. GEO. YOUNG: I didn't intend to go all over the ground.

The COURT: No, but you have gone over a good deal of it.

[Plaintiff rests.]

Defendant's Case.

THURSDAY, 2 p. m.

F. A. SHERWIN called for the defendant. Sworn.

Direct examination by Mr. GEO. YOUNG:

Q. Mr. Sherwin, what is your business?

A. Roadmaster, between Springfield and Sherbrooke.

Q. How long have you been employed in connection with railroad work?

A. About twenty-five years.

Q. What positions have you held as a railroad man?

A. Laying and construction up to maintenance and roadmaster.

Q. Won't you give the Court briefly the positions and the
94 roads that you have been connected with?

A. In the spring of 1888. —— and and Lake Erie, then to Evansville as Assistant Chief Engineer, then to the three C. and St. L., called the Big 4 road, and then about six years Boston & Maine as roadmaster.

Q. And in the positions which you held prior to going onto the Boston & Maine whether your duties were in connection with the maintenance of the roadway?

A. Mostly maintenance of the roadway.

Q. You now have charge of the maintenance of the roadway of the Boston & Maine from Springfield to Sherbrooke?

A. Springfield to Sherbrooke and some three or four branches.

Q. How long have you been in that position?

A. From Springfield to Sherbrooke about two years.

Q. Prior to that what part of the road did you have charge of?

A. Roadmaster on the Passumpsic.

Q. That was from White River Junction to Sherbrooke?

A. To Sherbrooke.

Q. Did you have to do with making some changes in the Lyndonville yard in the fall of 1901, or summer?

A. I *made* out that so-called yard.

Q. That is what has been referred to here as the cornfield?

A. Well, I think they call it the cornfield, I am not familiar with those names.

Q. Do you know this switch which has been referred to this morning as one on which Mr. Gokey was injured?

A. I have been told that is the switch he was injured on; I know where the switch is.

Q. That is the switch onto this ladder track?

A. This ladder track.

Q. How did that switch come to be changed from the east side to the west side of the main line?

A. When I came on the road the switches were in a bad condition, very bad shape, and for a better method of doing business I put in what we called a "ladder track," and had all the tracks on the east side lead off from this so-called ladder track and put them in uniform shape.

Q. What advantage was there, if any, to the employees in having that arrangement of tracks?

A. I think it is an advantage. It is a common practice with engineers to put ladder tracks in all yards.

—. What is the particular advantage?

A. Having the switches uniform distance apart and in line.

Q. What danger does it obviate having them all on one side of this ladder track?

A. The way it was before, the switches were first one side and then the other, and they were crossing back and forth all the time to do their switching.

Q. So that as the train was running along a man would have to be crossing the track in front of an approaching train?

A. He might have to be first one side and then the other.

Q. When this switch in question which moves the switches on this ladder track from the main line was put in, why was the high switch put in?

A. Well, we used the high switch on all the (facing point switches), generally speaking, for the reason that it gives the engineer better advantages to see the switch, more readily seen when he is approaching at a high rate of speed, this being the rule where trains are running fifty miles an hour, coming in, I thought it was better to use the high switch stand.

Q. You say that is more readily seen by the engineer?

A. Yes, sir.

Q. Now, what is the purpose of the target on the switch stand?

A. Well, if it shows red it is an indication to the engineer that the switch point is wrong.

Q. That is to say, that it would carry the train off from the main line?

A. Carry the train off from the main line and if it is going at a high rate of speed it would derail it.

Q. Is the target the thing that indicates to the engineer how the switch is?

A. It is in daylight.

Q. And at night what indicates that?

A. Use a switch lamp.

Q. And of course the same thing is true of that that it can be seen better when it is high?

A. Certainly.

Q. Now, what is the disadvantage of the low switch-stand in the winter?

A. Well, in this country, where we have so much snow, it had the

disadvantage of being hid in the snow banks, and snow piles up around the switch-stand, which is invariably the case.

Q. So that you consider the high switch-stand as much the safer for the operation of the trains?

A. Certainly, on the main line.

Q. Whether or no a very large proportion of the switches leading from the main line are the high stand and high targets?

A. I don't know just what number. I think we have a little over four hundred main line switches between Sherbrooke and Springfield. I don't know of but probably half a dozen, don't know as there is that number, low stand.

Q. As an engineer and roadmaster, what is your judgment as to the relative safety of the high and low targets for main line switches in the operation of trains?

A. Well, as far as safety from observation at an engineer's point, the high stand is the best.

Q. What, if any, advantage was there in having this switch placed on the right hand side of the main line between the main line and No. 1 over having it on the east side of the main line, the west side, I should say.

A. The advantage is in this, it is a facing point switch.

97 Q. Just what do you mean by that?

A. Facing point switch is where you are running your train towards the points. If a facing point switch is turned wrong and you are turning the point it would not put you off your iron, but if a facing point switch is wrong facing and you are going at a hight rate of speed, you will simply go into the ditch.

Q. Now, which way did this switch point, or face, which way were the points?

A. The points was facing north, what we call north facing.

Q. Now, to return to my question, what was the advantage, if any, in placing this switch on the west side of the main line rather than the east side?

A. The advantage in having the point where you are facing the switch is to have your targets always on the side the engineer is on, so he can see them more readily.

Q. And by placing this upon the west side the switch target would be upon the same side that the engineer would be when going south?

A. When approaching the switch.

Q. And that in that case was going south?

A. Yes.

Q. Which side of the train, east or west, is the engineer when the train is going south?

A. Going south the engineer would be on the west side.

Q. Do you remember, Mr. Sherwin, whether that switch was set exactly in the center between the two tracks, the main line and No. 1?

A. I don't recollect, but I am under the impression it was more to the side track, but I wouldn't swear to it.

Q. Why would it be placed nearer to the side track than to the main line?

A. Simply because the rod happened to be that length, the only reason, the switch connecting rod.

98 Q. If the space is not sufficient to leave ample room on both sides, that is, between the main line and the switch and between the side track and the switch, is there any reason for placing it nearer the side line than the main line?

A. No, I should say it should have been placed in the center in this case.

Q. If there is not sufficient room between the two tracks to make the switch absolutely free from any danger to persons or employees on the trains on either line, which line should have the preference as to safety?

A. The main line, of course, should have the preference.

Q. Do you remember the exact distance between those tracks?

A. No, not far from seven feet, but I don't remember the exact distance; I never measured it.

Cross-examination by Mr. Cook:

Mr. Sherwin, you say that you laid out this cornfield at the time it was laid out, the track?

A. Not the cornfield; I laid out just the ladder track.

Q. Just the ladder track alone?

A. Yes, sir.

Q. Did you re-arrange any of the other tracks in the cornfield?

A. Only just enough to fetch them into line.

Q. Just to fetch them onto this ladder track.

A. This ladder track, that is all.

Q. When do you say this was done?

A. I think about the last of September or first of October, 1901.

Q. Do you know who did it?

A. Emerson; I had a man by the name of Emerson.

Q. Where is he?

A. Lyndonville.

Q. North from where this switch is there is a curve, is there not?

A. Well, yes, quite a ways north, over a hundred feet north.

Q. Yes, but there is a curve north?

A. Yes, sir.

99 Q. Going around that curve before you get onto the straight line the engineer would have no difficulty in seeing the switch upon either side of the track, would he?

A. Well, he would see it more readily on the west side.

Q. Would he have any difficulty in seeing it upon either side?

A. Yes, if the trees on the bank are not cut he would not see it so readily on the east side as he would on the west side.

Q. Are they cut?

A. We cut them in the fall of the year always; yes.

Q. You say you are roadmaster?

A. Yes.

Q. As roadmaster of that road don't you know that for a number

of years where you come down upon that curve there has always been a clear view to where this switch is?

A. Why, yes, there is.

Q. Now, I want to ask you in this connection if there is either way for quite a distance level territory around this switch?

A. On the east side there is a bank and coal chute. On the west side it is level for a short distance.

Q. On the east side how far from the main line is that bank that you speak of?

A. Perhaps thirty or forty feet.

Q. Now, won't you tell the jury what trains there are coming in there at fifty miles an hour, passenger or freight?

A. Passenger trains.

Q. Won't you tell the jury what trains are scheduled to run between Newport and Lyndonville at the rate of fifty miles an hour?

A. No trains.

Q. Do you know what the scheduled train run- of the fastest trains between Newport and Lyndonville are?

A. They probably are not scheduled over thirty miles an hour.

Q. Before you reach this switch that has been spoken of there are other switches to the north and were then, were there not?

A. Yes, sir.

Q. In this same yard?

A. Same yard.

Q. And directly south of this switch there are other switches between that and the station?

A. Certainly.

Q. And you say that trains were in the habit of coming across this switch at the rate of fifty miles an hour?

A. I have timed trains going over at the rate of fifty miles an hour. The President's car of the Northern Pacific Railroad. One day I timed that with a special speed recorder.

Q. Now, you say you have upon the road between what places a half dozen low switches?

A. Well, we have two here at Newport, one at Barton Landing, and on the river road I don't know of any low switch stands.

Q. When you use the term "low switch," won't you indicate to the jury in your own way how high a switch, that is, how much it rises above the ground?

A. We have on our road five different switches.

Q. Just answer my question. Speaking of these half dozen switches, are they alike?

A. Oh, no.

Q. They are different height?

A. No, two or three different kinds. There is what we call the ball stand, low stand and the medium stand, and still have another, a high stand, and then we have what we call our No. 1 standard, that is one that is commonly used.

Q. Did you name four or five?

A. Four.

Q. You only have four?

A. Well, we have the fifth one; we don't use it for the main line at all.

Q. What is that one, a high or low stand?

A. That is a low stand.

Q. Now, these that you first mentioned, called the ball switch?

A. The first one is the ball switch.

Q. How high is that from the ground?

A. That switch is not over probably twelve or thirteen inches.

Q. Where is there one of those switches?

101 A. There is one at Barton Landing Bridge and two in Newport yard.

Q. Anywhere else?

A. I don't recollect any on the main line anywhere else.

Q. What do you say the next in height was?

A. The next is what we call our twenty-inch stand.

Q. And that is twenty inches high?

A. Twenty inches from the base of the rail, about that; I don't say it is, substantially twenty inches.

Q. And the next height?

A. Twenty-nine inches.

Q. Now do you call the twenty-nine inch switch a low switch?

A. Why, that is what we call a medium switch.

Q. So, when you spoke about a half dozen low switches on the road you didn't mean that twenty-nine inch switch?

A. No, I wouldn't class that twenty-nine inch switch low.

Q. There are quite a number of those twenty-nine inch switches, aren't there?

A. I don't know of any up here.

We have quite a number on the river road, the Connecticut river. I don't know of any north of White River Junction. I can't recollect anywhere we use a twenty-nine inch switch.

Q. Good switch, aren't they?

A. Oh, just as good as any.

Q. How much lower are those than your fourth switch that you name?

A. The fourth switch is a switch that we don't use at all on the main line; that is a low stand about fifteen inches high. The fifth switch, that is our standard, that is about five or six feet to the target, I should say.

Q. Don't you know how high they are?

A. Why, I don't know exactly the height of the standard switch; I don't know as I ever had occasion to measure them.

Q. You don't know whether they are five or six feet?

A. Between five and six feet.

102 Q. Now, as I understand you, this split switch arrangement you call a facing switch, where you approach the switch toward the points?

A. Approach toward the points.

Q. A person, or a train going from Newport south would approach this switch at the facing end?

A. Facing the points.

Q. That switch would have to be right or you would go where?

A. Go somewhere; it is hard telling where you would go, you would go onto the ground.

Q. As a railroad man would you go onto the ground if the switch was set for the ladder track rather than the other track?

A. If you was running south and that switch set for the ladder track, running fast, you would certainly go on the ground.

Q. If you were running at the rate of fifty miles an hour and you did go on the ladder track, you would go onto the ground?

A. I never heard of a train going very fast and stay on the rails.

Q. To- much curvature on the ladder track?

A. No——

Q. This switch that you speak of must be one of two ways. It must be set so that the train goes down the main line, or it must be set so that it goes on the ladder track?

A. That is right.

Q. You say that you put this switch, as you remember it, a little nearer the side track than you did the main line?

A. I think it is a little nearer, I never measured it.

Q. You say you put it there because the rod happened to be a little longer?

A. Just a little longer.

Q. Don't you know that it is just about a foot nearer the side track than it is the main line?

A. No, sir, I never measured it. I couldn't say whether it is a foot or two; I don't think it is a foot even.

103 Q. Never gave it any attention, did you?

A. Oh, no.

Q. You had occasion to change the switch to the other side, you say; now, did you use the same rod to do it?

A. I used a different rod entirely, different switch entirely.

Q. So that you selected the rod and selected the switch for the place, didn't you?

A. For that place.

Q. I suppose you have all lengths of rods?

A. No, sir, one standard length of rod. There is one rod only used, unless we take them to the shop and have them made over, when we buy them they all come one length.

Q. What length do they come?

A. About four foot.

Q. Don't you know just how long they come?

A. No, sir, never measured them.

Q. You don't know?

A. Not exactly.

Q. In all of your experience as roadmaster and trainman, you don't know the length which is the standard length of a switch rod?

A. Oh, no, not exactly; not to an inch or two I couldn't tell.

Q. That is no part of your business, is it?

A. No, not necessarily.

Q. That is no part of your business to see how far from the track or close to the track a switch stand is located?

A. We get them far enough so to clear.

Q. Is it any part of your business as roadmaster to see as to how far the switches are set from the tracks?

A. Yes, sir.

Q. How do you know how far they are set from the track without knowing the length of the switch rod?

A. I think the switch rod is about four feet and the connecting rod is about a foot outside of that, making it five feet. I don't know the exact distance from the switch rods.

104 Q. Now, that would bring the staff how far from the rail?

A. Bring the staff about four feet, four and one-half, probably.

Q. What was the foot that you mentioned?

A. That is the one that connects in under the rail on the other side.

Q. But you don't know whether it is four or four and one-half feet?

A. No, not absolutely; no.

Q. Do you know how wide the ordinary cars are?

A. I don't know anything about the cars, never had occasion to measure a car.

Q. Do you know how far cars project ordinarily over the rail?

A. I should judge about three feet or such a matter.

Q. That is your judgment?

A. That is my judgment.

Q. That cars project, as a rule; I am speaking of the ordinary freight cars, about three feet over the rail?

A. I should judge so.

Q. That is your judgment as roadmaster?

A. As roadmaster.

Q. It is upon that theory that you have laid out these tracks and laid out this particular switch?

A. Yes, sir.

Q. Now, Mr. Sherwin, you have said that they used up here this standard or high switch. What do they use down to the other end of the line, all through the Boston yards.

Mr. YOUNG: We object to what other roads use.

Mr. COOK: I am speaking about his road, your road.

Mr. YOUNG: This case is one that arose at the Lyndonville yard.

Mr. COOK: They went clear from Springfield to Sherbrooke. I don't want to overstep the proper bounds.

The COURT: The inquiry is over the same line that you went.

105 Mr. YOUNG: I don't understand that we went anywhere with regard to these switches and switch stands except between White River Junction and Sherbrooke on this division.

The COURT: I understood him to mention about the Connecticut River, which means from there to Springfield, as I understand it.

Mr. YOUNG: He may have carried it over by his answer to the question, I didn't catch that.

Q. What do you say, Mr. Sherwin, as to what they use on the

main line switches down through on this same road, at other places beyond White River Junction?

Mr. YOUNG: We object to their going anywhere off the line that he was examined on in his direct-examination, or from Sherbrooke to Springfield.

Q. You were educated in the school of practical railroading, were you not?

A. Yes, sir.

Q. You pretend that you are competent to be a roadmaster of this road, don't you?

A. I do not.

Q. You don't think you are competent?

A. I think I am competent.

Q. You claim to be competent?

A. Yes, sir.

Q. You have in your education and experience examined with relation to switches in the various parts of the country, have you not?

A. Yes, sir.

Q. Don't you know that the Boston & Maine Railroad has on its line, main line, switches in large yards that are very low?

Mr. YOUNG: That we object to, because what they use in the railroad yards is entirely different and the system is different from what is used on the main line switch.

Mr. COOK: I am speaking of the main line in the yard.

Mr. YOUNG: He hasn't said anything about what is used
106 in the large yards that are now referred to. We want an exception to the admission of any testimony as to any place outside of what his direct examination covered, that is the main line from Sherbrooke to Springfield and not including any yards.

Mr. COOK: If the Court please, we won't take any time over that question. That is all.

Redirect-examination by Mr. GEO. YOUNG:

Q. What do you mean by the switch rod?

A. The road that runs from the switch stand to the point of the switch.

Q. That runs from the rail to the bottom of the switch stand?

A. Goes from the plate across to the switch stand.

Q. It is the rod which moves the point?

A. The points.

Q. What is there in the Lyndonville yard just easterly of the main line and opposite this switch in question that occupies the place between this main line and the bank that you referred to?

A. Well, there is a coal track there and the coal chutes east of the coal track.

Q. Is all of the space west of the main line so far as it is level or practically that occupied with tracks?

A. It is practically all occupied.

Recross-examination by Mr. COOK:

Q. Mr. Sherwin, how far is it opposite this switch to the first track west?

WITNESS: Between the two tracks?

COUNSEL: Yes.

A. Why, I should think about seven feet.

Q. How far is it to the next track west?

A. That I can't recollect.

107 Q. Have you any idea?

A. Why, probably about the same, close to the same.

Q. And to the next track west?

A. The next track I think the switch leads out there and it would probably be different.

Q. Now, isn't it a fact that the outside track that was west is quite a considerable distance west of any other track?

A. Oh, it must be quite a distance.

Q. Several rods?

A. Probably three or four.

Q. Now, what fills the space between that track and the next track east, anything?

A. Nothing.

Redirect examination by Mr. GEO. YOUNG:

Q. What is the condition of the surface of the ground between the extreme west track and the track next to it, is it level?

A. No, no, the extreme west track is several feet lower than the other tracks.

Q. Whether there is quite a slope between those two?

A. Quite a slope.

GEORGE M. KENDALL, called for the defendant. Sworn.

Direct examination by Mr. YOUNG:

Q. What is your business?

A. Conductor on the Boston & Maine; freight conductor.

Q. Where are you running?

A. Between Newport and Lyndonville.

Q. Were you running on that train on the second of November, the day that Mr. Gokey was injured?

A. Yes, sir.

Q. Who was your train crew that day?

A. Davidson, conductor; John Gokey, brakeman; John Gokey and myself, Milo Shattuck, engineer; Fred Green, fireman.

108 Q. What was the number of the train that you were running at the time Mr. Gokey was injured?

A. Eighty-seven.

Q. How long had you and Mr. Gokey been running together on that train?

A. Something like two years, I should say.

Q. At the time that this accident happened what were you doing?

A. Making up a train to go north.
Q. What track were you on?
A. We were on No. 1.
Q. Do you remember what you were doing on No. 1?
A. We went in for two stock racks.
Q. And you were with the engine at that time?
A. Yes, sir.
Q. Was there any car attached to the engine when you backed in?
A. One.
Q. Who couples that car?
A. I did.
Q. After coupling what did you do?
A. I motioned to the engineer to try them ahead.
Q. To try them for what purpose?
A. To see if they were all hitched.
Q. What did you ascertain to be the facts?
A. They were.
Q. What did you then do?
A. Motioned him over the switch.
Q. What did he do?
A. Went ahead.
Q. Whether or no you got onto those cars?
A. I did. I got onto the cars when they started.
Q. Were you on the cars when they were passing this switch that lead into the cornfield?
A. Yes, sir.
Q. Did you know at that time where Mr. Gokey was when you got onto the train?
A. I think he was coming across from the other side.
Q. What do you mean by the other side?
A. From the cornfield.
Q. And did you see him after you got onto the top of the cars before he was hurt?
A. No, sir.
109 Q. What was the first that you knew that anything had happened?
A. I felt the jar of the car when it went over him and I looked back to see what it went over, and I saw him lying beside the rail.
Q. And you were then on the rear car?
A. Yes, sir.
Q. Upon discovering him there, what did you do?
A. I got off and went back to him.
Q. What became of the train?
A. Rode over to the switch, I guess.
Q. Do you remember where your buggy was at that time?
A. I kicked the buggy down on some track in the cornfield.
Q. Do you know about the switch having been changed sometime before the accident?
A. Yes, sir.
Q. How long should you say it was before the accident?

A. Possibly four to six weeks.

Q. Had you ever seen Mr. Gokey set that switch after it was changed?

A. Yes, sir.

Q. And whether more than once?

A. Yes, sir.

Q. I wish you would state how he came to set that switch, what you did after you pulled into the yard that makes you certain of that?

A. Going into Lyndonville on 72, our train down, we pulled in on No. 1 at the switch just south of the water tank. He was the head brakeman, I was the hind brakeman. After pulling our train in on No. 1 we left it there, he pulled the pin, uncoupled his engine, and came down the main line. I set the switch and let his engine in onto the buggy. He hitched on and backed onto the main line to this switch that he was hurt by, set the switch. I set up the main line switch as we pulled the buggy out, went over across to the box shop switch, set the box shop switch to receive the buggy, and followed down, and he pulled the pin on the buggy. I catched onto the train and let the engine in onto the coal chute track to get coal, or in on the engine house track, where they wanted to go, and set our main line switches for the main line.

Q. And was that the way that you usually worked when you came into the yard?

A. Yes, sir.

Q. And in making that movement as you have described who set this cornfield switch where he was injured?

A. Why he set the switch that let the buggy in there, and I set it back on the main line.

Q. When you came north you were the head end man and he the rear end man?

A. Yes, sir

Q. Where in connection with your work did you shift ends of the train?

A. Generally shifted ends when he pulled the pin on the buggy, he went in on the box shop and I went in on the engine.

Q. That was just after he set this cornfield switch?

A. Yes, sir.

Q. Does this plan here show the general arrangement of the Lyndonville yard?

A. Yes, sir.

Q. I call your attention to this track up here near the buildings.

A. That is the box shop.

Q. That is where you usually set the buggy?

A. Yes, sir.

Q. I call your attention to this mark right here which indicates a switch right opposite the coal shed; is that where this ladder track starts from?

A. Yes, sir.

Q. And that is the switch which you referred to that Mr. Gokey frequently set? (Indicating.)

A. Yes, sir.

Q. And he could notice it was there?

A. Yes, sir.

Q. Was there anything to prevent a man going from over here near the box shop switch, going up across the yard over this No. 1 track and along through between there (indicating)—was
111 there anything to prevent his seeing the target on this switch if he looked in that direction?

A. No, sir.

Q. What kind of a day was it when Mr. Gokey was injured?

A. Fair day, I should say.

Q. After you discovered that he was injured what was done with reference to caring for him?

A. Took the engine and carried him down to the depot, got a stretcher and carried him down to Web's hotel.

Q. How was that target at the time of the accident; that is, whether the wide way or crossways the tracks, or otherwise?

A. It was set to go into the field.

Q. Would that bring it so that the wide way of the target would be toward a man down the main line here a ways?

A. Yes, sir.

Q. A person on the main line or between the main line and No. 1 to the south of it, and looking in that direction would see the target in the widest way?

A. Yes, sir.

Q. And it was painted red?

A. Yes, sir.

Q. And when that was set for the cornfield, it was the width of it right cross-ways of the tracks?

A. Yes, sir.

Cross-examination by Mr. HOWE:

Q. Mr. Kendall, was there a time when there wasn't any target on that switch where Mr. Gokey was injured?

A. Not that I remember, not at that time.

Q. Just before he was injured?

A. I don't remember.

Q. Do you remember that there was a time about along there about the time he was injured when there was no target on it?

A. I don't seem to remember.

112 Q. Do you remember distinctly that there was a target on the switch the day he was injured?

A. Yes, sir.

Q. Sure about that?

A. Yes, sir.

Q. Now, in drawing your train into Lyndonville, you drew down the main line by the switch on which he was injured, and went in on the cut-off switch onto track No. 1?

A. Yes, sir.

Q. Now, when the train was on track No. 1, then your duties as rear brakeman changed to the duties of the forward brakeman?

A. No, sir.

Q. When did the duty change? Shift between you and Mr Gokey?

A. My duties changed when he pulled the pin on the buggy down there and I took the engine onto the engine house track.

Q. When the engine came back and hooked onto the buggy then your duties became changed?

A. No, sir.

Q. When,

A. When he pulled the pin on the buggy and run it in onto the box shop I went with the engine.

Q. Well, then, he was the man to pull the pin on the buggy and ride it in onto the box shop?

A. That was the way we done our work.

Q. So that he was the man to ride the buggy in onto the box shop?

A. He generally did.

Q. Now, whoever throwed the switch at the time the buggy was kicked in onto the box shop track had to do it very quickly, didn't they, and mount the buggy?

A. Well, not necessarily. A man generally has time to throw a switch and get on without hurrying very much.

Q. Have to tend right to it?

A. Generally. Yes, a railroad man always tends to business.

113 DAVID W. DAVIDSON called. Sworn.

Direct examination by Mr. GEO. YOUNG:

Q. Mr. Davidson, where do you live?

A. Newport.

Q. What is your business?

A. Freight conductor.

Q. On the Boston & Maine?

A. Yes, sir.

Q. How long have you been so employed?

A. About thirteen years, I think.

Q. Where were you running in the fall of 1901, November?

A. From Newport to Lyndonville.

Q. Who was your train crew on the second of November, the day that Mr. Gokey was injured?

A. Engineer, Milo Shattuck; fireman, Fred Greene; and brakemen, John Gokey and George Kendall.

Q. And yourself conductor?

A. Yes, sir.

Q. When you pulled into the Lyndonville yard where did you generally land your train?

A. On No. 1 siding.

Q. Did you see this accident?

A. No, sir.

Q. Where were you at the time that the accident happened?

A. I was over to the engine house.

Q. Do you know how this switch stood, how the traget stood at the time of the accident, were you there, immediately after—were you there before Mr. Gokey was moved?

A. No, I wan't there for quite a while after.

Q. Have you ever seen Mr. Gokey handle the swtich which lead into the cornfield siding after it was changed?

A. Yes, sir.

Q. About how long before the accident should you think that switch was changed?

A. I should think a month or six weeks; I couldn't say for sure.

Q. After putting your train onto the No. 1 siding, what was done with the buggy?

A. It was put onto the box shop siding.

114 Q. Who usually rode the buggy onto that siding and set this cornfield swtich, if it was the same person?

A. I couldn't say as for that, probably John Gokey or Kendall.

Q. Whether you have known of Mr. Gokey's setting that switch a number of times after it was changed?

A. Yes, sir.

Q. When you say the switch leading to the cornfield siding, you mean this target, this switch stand where Mr. Gokey was injured?

A. Yes, sir.

Q. Was there anything to prevent Mr. Gokey or any one from seeing this switch stand and target when they were three or four rods south of it between No. 1 and the main line if they looked?

A. No, sir.

Q. What kind of a day was it when this accident happened?

A. It was a fair day.

Q. And about how large is that switch target?

A. I think it is fifteen inches wide and twenty-two long, I think.

Q. When that was set for the cornfield siding how did it stand with relation to the tracks, whether it was the wide way across or whether it was turned so that the thin way of the target was parallel with the tracks?

A. Wide-way across.

Q. So that as one stood between those tracks looking up he would see the full bigness of the target if he looked at it?

A. Yes, sir.

Q. Do you know which way that target was at the time of the accident of your own knowledge, I am asking for?

A. No, I do not.

Q. Where was Mr. Gokey when you got back to the scene of the accident?

A. He was on the engine.

Q. How frequently do you think Mr. Gokey set that swtich?

A. I couldn't say as to that.

115 Cross-examination by Mr. COOK:

Q. Make any difference, Mr. Davidson, as to who set that switch depending on what track the buggy was to be shoved in onto?

A. Yes.

Q. Now, Mr. Davidson, going down on that train Mr. Gokey was front brakeman and Mr. Kendall rear brakeman, were they?

A. Yes, sir.

Q. And returning to Newport they were just the reverse?

A. Yes, sir.

Q. And at some point of their labors at Lyndonville the change took place?

A. Yes, sir.

Q. Now, was there any rule ever with relation to that, or was there simply an agreement between them at their convenience that that change from rear to head brakeman, and head to rear brakeman took place? Was there some rule laid down or something of that kind, or was it simply an arrangement that had got to be sort of a custom among them?

A. I don't know as there was a rule. It was a custom to change on their train.

Q. That isn't quite what I mean, Mr. Davidson. I don't make myself plain. Not the proposition that the change occurred, but when it occurred, that is, at what point, is there any custom or rule about that?

A. No, sir.

Q. So that the rear brakeman going down may assume the duties of head brakeman early or late in the preparation of your train, may he not, for all of any rule or custom that you have?

A. Most generally after they had disposed of their train they changed them.

Q. They changed?

A. Most generally.

Q. When do you call it that the train is disposed of, when the engine is in the engine house or when the train is on the side track where it is to be left?

A. After it is left on No. 1 siding and the caboose set off I should say.

116 Q. That is your understanding of it?

A. Yes, sir.

Q. You don't know what the understanding of other railroad men is, do you?

A. Some, not a great deal. I don't know how they did it, I am sure.

Q. Now, Mr. Davidson, if Mr. Gokey went and set this switch, the ladder switch, the switch where he was injured, and then was to mount the buggy, why his duty called him away from the switch to get onto the buggy and ride down into the cornfield, didn't it, after he had set the switch, I mean?

A. Yes. He pulled the pin and rode the caboose down.

Q. He would pull the pin on the engine?

A. Yes, sir.

Q. After setting the swtich?

A. Yes, sir.

Q. He would go to some point on the line somewhere and pull

the pin on the engine and get onto the buggy and ride down into the cornfield?

A. Yes, sir.

Q. Now when Mr. Gokey did as you have described that you remember of, to wit, went up there and set this switch, then uncoupled the buggy and then rode it down into the cornfield, what was Mr. Kendall doing?

A. I suppose he was righting the switches for the box shop.

Q. He had nothing to do with the buggy, had he?

A. I presume he let it in.

Q. I mean under those circumstances?

A. No, not under those circumstances.

Q. He had nothing to do with the buggy?

A. Not then; no, sir.

Q. Nor with the switch?

A. Just with the box switch.

Q. Well, now, on these occasions that you now remember
117 of seeing Mr. Gokey set this switch that you have told of, where was Mr. Kendall?

A. Probably be on the head and making up trains.

Q. I don't think I make my question plain. You say you have seen Mr. Gokey set this switch since it was changed over, the one where he was injured, don't you?

A. Yes, sir.

Q. Now, on these occasions when you remember to have seen him set that switch, on those occasions what was Mr. Kendall doing?

A. Why, I suppose he was on the head end.

Q. Don't suppose. Where was he, do you remember?

A. I can't say for sure.

Q. Do you know whether he was setting switches down further in the yard, or whether he was farther up the main line?

A. Doing both, catching cars and setting switches.

Q. I call your attention to the particular times when you saw this man Gokey set this switch after it was changed. Do you remember where Kendall was those times that you now remember seeing Gokey set that switch?

A. I think I have seen him on the head end on the top of the train.

Q. He would be head brakeman?

A. Yes, sir.

Q. Where would he be, north or south of this switch?

A. He would be north, if he was on top of the cars.

Q. Going from where?

A. Pulling out of the cornfield yard.

Q. Pulling out of the cornfield yard?

A. Yes, sir.

Q. Where would he be going?

A. Making up trains, shifting.

Q. Where on this occasion that you speak of when you saw him on top of the train north of the switch, where did he go directly after? Where did the train go that he was making up?

A. Shifting from the cornfield to the main line and from the main line to the cornfield.

118 Q. I take it this was when they were making up trains?

A. Yes, sir.

Q. It was not when Mr. Gokey was still pursuing his duties as front brakeman?

A. No, sir.

Q. You say you think it was how long before the injury that this switch was changed?

A. I should thing a month or six weeks, I wouldn't say positively.

Q. Have you any very positive idea about it, Mr. Davidson?

A. No.

Q. It is a good while ago, isn't it?

A. Yes, sir.

Q. Some three or four years ago?

A. Yes, sir, I should think so.

Q. Do you know whether it was cold weather that day that he was injured?

A. No, it wasn't very cold.

Q. Do you remember whether the ground was frozen?

A. I don't think so.

Q. You simply look back upon it and say to yourself that you think it was a month or six weeks that it had been changed before he was injured, that is your best judgment, is it?

A. Yes, sir.

Q. When you pulled in with your train, the usual custom and that day, if you please, you rode in the buggy down to the station or down as far as your train went?

A. No, I went over on the engine.

Q. When did you leave to walk forward to the engine?

A. When we pulled into Lyndonville.

Q. When you were pulling into Lyndonville?

A. Yes, sir.

Q. And about the time the train come to a stop where would you be?

A. On the engine.

Q. Then where would you go?

A. Go upstairs to the office.

Q. At the station?

A. At the depot, yes.

Q. How long did your ordinary duties keep you upstairs?

119 A. Sometimes five minutes, about five minutes, ten minutes.

Q. Then where would you go?

A. Go to the caboose.

Q. Go to the caboose?

A. Yes, sir.

Redirect examination by Mr. GEO. YOUNG:

Q. In making up the trains here in the cornfield whether you would frequently pull out onto the main line by this cornfield switch, so-called?

A. Yes, sir.

Q. So that you had frequently to set that switch back and forth as trains were being made up in there?

A. Yes, sir.

Q. Now, referring to the occasions when you bring the buggy out from the No. 1 siding, in pulling the buggy out from the No. 1 and running up over this switch, where would the engine and the buggy stop with reference to that switch, whether it would be near to it or some distance from it before they kicked it down into the cornfield?

A. It would be right at the switch, just over the switch.

Q. So that the man who rode up there would ride up there and get off about as the buggy stopped and set the switch and get on again?

A. Yes, sir.

Q. And he wouldn't have to go very far from that switch in doing that, would he?

A. No, sir.

Q. And then would ride the buggy down until he stopped it down on the box shop track, or wherever it went?

A. Yes, sir.

Q. Now, with relation to this switch here on the main line? Was there any rule that required, or any custom, you to keep that always closed? Did you always have to keep that right for the main line except when you were using it? Perhaps I don't make myself understood. If you pulled up onto the main line you had to set that switch to get out onto the main line, didn't you?

A. Yes, sir.

Q. And if you went back into the cornfield you had to set it again so that the main line would be clear?

A. Yes, sir.

Q. So that every time you pulled out of the cornfield that switch had to be moved twice, that is, when you came out, and when you went away from it?

A. No, we could make up our train there and leave the switch that way until we got through making up. There wasn't no trains due, no passenger trains due and after we got through using it we would have to set it back on the main line again.

Q. So that you didn't always have to set it back every time you went over it?

A. No, sir; not always.

Q. You replied to Mr. Cook that it was some six weeks you thought before this that that switch was changed?

A. Yes, sir.

Q. Did you make a statement with reference to the facts in this matter shortly after the accident happened?

WITNESS: I don't understand you.

COUNSEL: Did you make a written statement of the circumstances of this accident shortly after it happened?

A. Yes, sir.

Q. And have you examined that statement recently to refresh your memory with relation to those facts?

A. Yes, sir.

Recross-examination by Mr. COOK:

Q. When they were up there to kick the buggy back were you up there in that vicinity?

A. Not always, sometimes I would be.

121 Q. Wasn't you usually somewhere else than in the vicinity where this switch is when they were up there to kick the buggy back?

A. Not always, sometimes I was up there and again I wan't.

Q. What would you be up there for?

A. To get into the caboose.

Q. To get into the caboose?

A. Yes, sir.

Q. Did you ordinarily get into the caboose until it had come to this stop?

A. No, right there is the box shop, right there close by.

Q. You usually got into the caboose after it had stopped down in the box shop, didn't you?

A. Sometimes.

Q. I asked you what you usually did?

A. Not always.

Q. When they kicked that buggy back down in there did the engine run back down onto this ladder track?

A. Yes, sir.

Q. Ladder siding?

A. Yes, sir.

Q. How far down?

A. Not but a short way.

Q. Did it always run back from the main line iron. I speak of the engine?

A. Why, I wouldn't say as to that.

Q. Wasn't it the rule to run up the main line enough so that they could kick it back down onto that switch or that siding without having to run the engine down over that siding at all?

A. No, so.

Q. These times when you saw Mr. Gokey set this switch, who let the buggy down in when they were kicking it down through, who closed the switch after the buggy was kicked down?

A. I don't know, I never see John Gokey set the switch to kick the buggy down.

Q. You never did.

A. No, sir.

122 MILO A. SHATTUCK, called for the defendant. Sworn.

Direct examination by Mr. GEO. B. YOUNG:

Q. Mr. Shattuck, what is your business?
A. Locomotive engineer.
Q. On that road?
A. Boston & Maine.
Q. What was your business in November, 1901?
A. Locomotive engineer.
Q. On the same road?
A. Yes, sir.
Q. Where were you running on the second of November, 1901?
A. Between Newport and Lyndonville.
Q. And who was your fireman?
A. Fred Greene.
Q. Who was your conductor?
A. David Davidson.
Q. Who was brakeman on that train?
A. Kendall and Gokey.
Q. What was the first that you knew of the accident to Mr. Gokey?
A. Well, the fireman told me that the brakeman had got hurt.
Q. Where were you at that time?
A. I was on the engine.
Q. Where were you going—what track were you going out of?
A. We were going out of the No. 1 track.
Q. Onto what?
A. Onto the main line.
Q. Do you know who gave the signals on which you moved out of that No. 1 siding?
A. Kendall.
Q. Where were you when you first saw Mr. Gokey after he was injured?
A. Well, it was after they backed the cars down by to get him onto the engine, the first I saw of him.
Q. After you had gone out onto the main line and backed down to him?
A. Yes, sir.
Q. How was that switch target set at that time?
A. Set for the cornfield siding.

123 Q. That would be so that it showed red? And that would be so that the target was standing crossways between the tracks?

A. Yes, sir.
Q. About how long had you been running this particular train at that time?
A. I had been on there a little over a week, I guess.
Q. And this particular switch stand stood where it was the day of the accident during all the time that you had been running that train?
A. Yes, sir.
Q. Did you ever see Mr. Gokey set that switch?

A. Yes, sir.

Q. What kind of a day was it when this accident happened as to being clear or otherwise?

A. It was a clear day.

Q. Was there anything to obstruct the view of that target from down south of the target between No. 1 and the main line three to five or six rods?

A. No, sir.

Q. Do you know whether there are other switch targets along the line between here and White River as near the track as this switch target stood to the No. 1 siding?

A. Yes, sir.

Q. How long have you been engineer, Mr. Shattuck?

A. Twelve years.

Q. What do you say from the engineer's standpoint as to the comparative safety of the high and the low switch stand?

A. I should prefer the high.

Q. Why?

A. More easily seen.

Q. And what does the switch target indicate to the engineer with relation to the switches?

A. If it is crossways the track it is for the siding, and if it is straight, it is for the main line, shows a red light at night, red and green.

Q. And the target in the day or the lamp at night indicates the condition of the track, whether it is safe or otherwise?

A. Yes, sir.

Q. And the red light shows the switch set for the siding?

A. Yes, sir.

124 Q. And the green shows that the main line is clear?

A. Yes, sir.

Q. Which side of the main line, Mr. Shattuck, ought the switch target to be, to be most convenient for the engineer in operating trains?

A. Ought to be on the right-hand side.

Q. Now take, for instance, the switch light, this switch here where you are approaching the points, which side ought that switch target to be, the side that the engineer is on as he approaches those points or as he trails that switch?

A. Ought to be on the engineer's side as he approaches the point.

Q. Why?

A. Be more readily seen.

Q. And suppose you are going into that switch trailing the switch, is there any particular danger in the split switch such as this was?

A. Going the other way?

Q. Yes, going?

A. No, sir.

Q. Going north, for instance, by that switch, if it was set for the cornfield siding would your train be derailed?

A. No, sir.

Q. If it was set for the cornfield and you were going south it would throw you off the main line?
A. Yes, sir.

Cross-examination by Mr. COOK:

Q. Mr. Shattuck, do you have some rule in your business with relation to how you shall approach a station when you reach the station yard with relation to your train being under control?
A. Yes, sir.
Q. Now, just what is that?

Mr. YOUNG: The rules I suppose are in writing, and that is the best way to prove them.
Mr. COOK: We have no rules, we don't know whether they are in writing or not.
The COURT: You can ask the witness.

125 Q. What do you say, Mr. Shattuck, is there some rule in writing with relation to approaching stations with your train being under full control?
A. Yes, sir.
Q. Now, Mr. Shattuck, when you speak about the high switch being the safest, do you speak as an engineer and its safety to trains moving in, or do you speak with relation to the trainsmen being about moving cars and on the sides thereof?
A. Speak for the trains moving.
Q. It is not, in yo . judgment, the safest for men upon the sides of moving cars unless it is set far enough away so that it won't touch them, is it?
A. No, sir.
Q. You say you took this man Gokey after he was injured onto your engine?
A. Yes, sir.
Q. Did you uncouple from the cars that you had coupled to?
A. Yes, sir.
Q. Who did that?
A. Mr. Kendall.
Q. Did you immediately, or did you back down onto this siding again?
A. We backed the cars into the cornfield siding.
Q. In onto the cornfield siding?
A. Yes, sir.
Q. Do you know how that switch was set other than that you had just come out of there and were going back in there again?
A. No, sir.
Q. In your judgment as a practical railroad man, if the high switch is used and set so far from a car as to look safe and so near as to just barely strike a man in the rear as he passes on the side of a car, what do you say as to whether that is a safe switch to have?

Objected to and question withdrawn.

Redirect examination — Mr. GEO. YOUNG:

Q. Mr. Shattuck, could this switch have been set any dif-
126 ferently than you have described as crossways and you get into and out of the cornfield siding?

A. No, sir.

Recross-examination — Mr. COOK:

Q. I suppose, Mr. Shattuck, you don't mean but what it might have been closed after you moved out and opened for you when you wanted to move in again?

A. No, sir.

F. W. GREENE called for the defendant. Sworn.

Direct examination — Mr. GEO. YOUNG:

Q. What is your business?

A. Locomotive engineer.

Q. What were you doing in November, 1901?

A. I was firing train No. 72 and 87 between Newport and Lyndonville.

Q. Who was your engineer?

A. Milo Shattuck.

Q. And Mr. Gokey one of the brakemen on that train?

A. Yes, sir.

Q. That was the day that he was hurt?

A. Yes, sir.

Q. What was the first that you knew of the accident to Mr. Gokey?

A. After we had pulled out of No. 1 track onto the main line, so that we could look back between No. 1 and the main line.

Q. Where did you then see him?

A. Lying on the ground, south of No. 1 switch, or the cornfield switch.

Q. How was that switch target at that time?

A. It was crossways between the two tracks.

Q. That was set for the cornfield?

A. Yes, sir.

Q. Which side of the switch was Mr. Gokey, the north side or south side?

A. South side.

Q. Any lying near the track?

A. Yes, sir, between the tracks.

Q. You mean between the main line and No. 1?

A. The main line and No. 1.

127 Q. After seeing him there what did you do?

A. I think we backed the cars in onto the cornfield siding and pulled the pin on them and took him onto the engine and took him to the station.

Q. Who gave the signal for you to move out of that siding?

A. Brakeman Kendall.

Q. Whether or no he went up onto the top of the cars?

A. I couldn't say as to that.

Q. After you discovered Mr. Gokey there you took him down to the station on your engine?

A. Yes, sir.

Q. Had you ever seen Mr. Gokey set this switch after it was changed?

A. Yes, sir.

Q. How long should you say it was before the accident that that switch was changed?

A. Oh, from four to six weeks, I should say.

Q. Whether or not you had seen him set that more than once?

A. I presume, yes; I think I had seen him set it more than once.

Q. Do you know how much space there was between that target and the side of the car?

A. Well, I couldn't say just exactly, I was there at the time the measurements were made.

Q. You don't recall the exact distance?

A. No.

Q. Who measured that?

A. Well, I couldn't say.

Q. Was it one of the car repairers?

A. I think Mr. Hazel was there, one of the car repairers.

Q. And Mr. Knight?

A. I think so.

Cross-examination by Mr. Howe:

Q. Now, when you were running from Newport to Lyndonville what duties did Mr. Gokey perform?

A. He was head brakeman on train 72.

Q. And that had been the way that train had been run for some time before the injury?

A. Three months at least.

Q. Now, do you feel sure that he was always head brake-
128 man during the three months previous to the injury?

A. Yes, sir.

Q. Now, when you arrived at Lyndonville, and set the buggy in on track No. 1 their duties changed, they shifted?

A. They shifted somewhere there in Lyndonville.

Q. Do you know at what time?

A. No, I couldn't say just what moment.

Q. Now, in making up the train in on the cornfield tracks who is it that couples the cars together and looks after the rear end of the train in on those tracks?

A. Rear brakeman.

Q. Rear brakeman?

A. Yes, sir.

Q. So that it would be the rear brakeman going north that would look after the rear part of the train as it was being made up on the cornfield tracks?

A. Yes, sir.

Q. Now those tracks in on the cornfield side are quite long side tracks, aren't they?

A. Yes, sir.

Q. And they are so arranged that you can get from all of those tracks onto the track that branches off from the main line without going onto the main line?

A. Yes, sir.

Q. Now, in making up your train to go to Newport, I suppose you took cars that came from the south?

A. Yes, sir.

Q. So that trains coming from the south that you were to haul to Newport would be run in onto the cornfield tracks from the southerly part of the cornfield yard?

A. Yes, sir.

Q. And is that about opposite or a little above the passenger station?

A. Right opposite the passenger station.

Q. Now, how far is it, as near as you can tell, from the passenger station up to the place where the switch is located that Mr. Gokey was injured on, how many rods?

A. One hundred rods or more.

129 Q. Now, would you have to do a great deal of shifting in on the cornfield tracks before your train would be in readiness to go to Newport?

A. Sometimes we would and other times we wouldn't. Sometimes we would shift there an hour and a half or two hours.

Q. How was it most of the time?

A. Well, I should say that about an hour would cover it on an average.

Q. Were there times when your train would come in from the south all made up and all you would have to do would be to hook on and go on to Newport?

A. Oh, no.

Q. Now, how much would you pull out from the cornfield tracks onto the main line in making up the train?

A. There were times that we would pull out thirty car lengths.

Q. Was that often or seldom?

A. Very seldom.

Q. Now, during the two or three weeks previous to the accident, do you know whether Mr. Gokey performed the duties of rear brakeman in on the cornfield tracks while the train was being made up?

A. Certainly was.

Q. So that in performing his duties in making up the train he wouldn't have occasion to use this switch at the place where he was injured?

A. He would have to use it.

Q. If he was the rear brakeman wouldn't the forward brakeman be the man to take care of that switch?

A. Forward brakeman with any length of train has to be on top where you can get a motion from him.

Q. You say you went out over there sometimes?

A. Yes, two or three times a week and sometimes not more than once.

130 Redirect examination by GEO. B. YOUNG:

Q. Every time you did go out onto the main line that switch had to be set, didn't it?

A. Yes, sir.

Q. Whether you went onto the main line or not would depend some upon the track you were on as you were pulling out?

A. Yes, sir.

Q. If you had a train just long enough to reach from the place where the track connected with the ladder track to the main line you would have to go onto the main line to clear it?

A. Yes, sir.

Q. You said that there was sometimes that you pulled as many as thirty cars up onto the main line?

A. Yes, sir.

Q. What do you say about its being a common occurrence to pull two or three or five cars up there?

A. It is a very common occurrence.

Q. And whenever you went up over those switches you say the forward brakeman would be on the cars to give the signals?

A. Yes, sir.

Q. And the rear brakeman would be the man to set the switches?

A. Yes, sir.

Q. And that Mr. Gokey was the rear brakeman?

A. Yes, sir.

J. A. KNIGHTS, called for the defendant; sworn.

Direct examination by Mr. GEO. YOUNG:

Q. Where do you live, Mr. Knights?

A. Lyndonville.

Q. What is your business?

A. General foreman of the car department—car shop.

Q. On the Boston & Maine?

A. Boston & Maine Railroad.

Q. How long have you been employed in that position?

A. Since October 16, 1891.

Q. And at Lyndonville all that time?

A. I have.

131 Q. Did you learn of an accident to Mr. John Gokey which happened near the switch leading into the cornfield along about the second day of November, 1901?

A. I did.

Q. Did you make some measurements as to the distances between the switch target and the cars at that time?

A. I did, sir.

Q. Do you know the number of the car that Mr. Gokey was on at the time when he was injured?

A. It was car 4009, stock car 4009. 2709 I mean.

Q. Have you made some measurements with relation to the switch stand and the distance between the tracks, the main line and track No. 1?

A. I have; I have a sketch of them here.

Q. You may state the distance which this switch stand is from the main line?

A. Four feet seven inches from the main line rail to the center of the switch target.

Q. How far was it from the rail nearest the switch stand on the No. 1 track to the center of the switch staff?

A. Three feet and ten inches. That is from the inside of the rail nearest the switch stand. Both of these measurements are from the inside of the nearest rail.

Q. What is the height of the switch target from the bottom of the switch target to the ground?

A. From the bottom of the switch target thirty inches and a half (30½); two feet and a half.

Q. That is from the ground to the bottom of the target?

A. Yes. I beg your pardon, it is fifty inches and a half.

Q. That would be four feet two and one-half inches?

A. Yes.

Q. What is the height of the target itself?

A. Twenty-two inches.

Q. How wide is that target?

A. Fifteen inches.

Q. How far is it from the target when it is set crossways between those tracks to the grab irons on that car on which Mr. Gokey
132 was riding at the time of the accident..

A. Thirteen inches.

Q. Thirteen inches?

A. Thirteen inches.

Q. How far is it from the side of that target set in that way to the posts on that stock track?

A. Fourteen and three-fourths inches (14¾).

Q. How far is it from the side of that switch target to the boarding inside the posts on that car?

A. Seventeen and five-eighths inches (17⅝).

Q. I wish you would describe to the jury how that car is constructed, how the posts are set and the boarding, their relative position, whether the boarding is outside the posts or the posts outside.

A. The bottom of that car is practically the same as a common car with stake pockets on the outside and the posts are put into the stake pockets and the boarding is put into the inside of the stakes, and these stake pockets are made expressly for that class of car with pockets on the side for the posts to be put into.

Q. The pockets are on the outer side of the sills?

A. Outer side of the sills.

Q. Was this car built there at Lyndonville?

A. It was.

Q. And were there a number of other cars built there at about that time of exactly the same size?

A. There was fifteen cars built at that time of that pattern.

Q. Was 2701 one of those cars?

A. It was.

Q. And was that car the same size, same dimensions in every way as 27009?

A. It was built at the same time.

Q. How many grab irons were there on the end of that car, of 27009?

A. Do you mean directly on the end or on the corner?

COUNSEL: On the corner, I mean, the side and the end both.

133 A. There were two. There was one horizontal and one perpendicular.

Q. That is on the side of the car next to the end?

A. That is on the side.

Q. And is there a grab iron on the end?

A. There is one diagonally on each corner.

Q. How far is it from the ground, or from the top of the rail, whichever your measurement is taken from, to the grab iron on the side of the car?

A. It is five feet six and one-half inches (5 ft-6½ in.).

Q. From where?

A. From the top of the rail to the bottom end of the grab handle.

Q. How does that grab iron run, up and down or horizontal?

A. That runs up and down.

Q. And is there a stirrup under that?

A. There is on the under side of the side sill.

Q. How far does that stirrup come below the sill of the car?

A. Seven and one-fourth inches (7¼ in.).

Q. How wide is that stirrup?

A. Eleven inches and a half (11½ in.).

Q. Is there an end ladder or a side ladder on that car?

A. End ladder directly on the corner, on the end.

Q. How far apart are the rounds of that ladder?

A. They are fifteen inches apart.

Q. Have you in your hands a sketch showing the relative location of those tracks and the switch targets?

A. I have.

Q. Also of the end and the part of the side of that car that Mr. Gokey was on?

A. I have.

Q. Did you examine the grab iron, stirrup and the ladder on that car on the day of the accident to determine whether they were in good condition or not?

A. I did, sir.

Q. How did you find them?

A. Found them all right.

134 Q. And were they in just the position that you have described them?

A. Yes, sir; exactly in the same position.

Q. Is this an accurate draft, Mr. Knight (Defendant's Exhibit A)?

A. It is.

Mr. GEO. YOUNG: Defendant's Exhibit A is the diagram sketch which you have been testifying concerning?

A. Certainly.

Q. And are the figures shown on this diagram indicating the distances, the figures which you have given in your testimony?

A. Yes.

Mr. GEO. YOUNG: We offer this diagram, if the Court please, Defendant's Exhibit A.

Mr. COOK: We don't for a moment concede that it is correct, Mr. Young.

Cross-examination by Mr. COOK:

Q. Mr. Knight, when did you make this plan?

A. I made it—I don't know exactly when it was I made that—it was some time after the accident. I made a rough sketch in the first place and then took it off.

Q. When did you make this plan?

A. I made it six months ago, I guess.

Q. Some time within a year?

A. Oh, yes; but I had—I made a rough sketch in the first place.

Q. When did you make your measurements that you made this plan from?

A. I made—the first measurements—I made at the time of the accident, and then I verified them with this plan afterwards.

Q. Verified them with this plan?

A. I had the rough sketch of this switch.

Q. Where is the rough sketch and figures that you made?

A. Well, that is at the shop or else it is destroyed, I don't
135 know which. I gave it to my draftsman at the shop.

Q. How did you happen to make some measurements the day of the accident?

A. Because that is part of my business.

Q. That was a part of your duty?

A. Yes, part of my duty, sir.

Q. And you set those figures down on a rough sketch that you then made, is that right?

A. That is right, sir.

Q. And that may be in the shops or may be destroyed?

A. Perhaps the man that made the drawing——

Q. That was made at the time, and that may be destroyed and it may be in the shops; you don't know anything about it?

A. No, I don't know what become of it.

Q. Did you make this plan?

A. I did not, sir; I made the measurements there.

Q. You didn't put them on there?

A. No, but I had a man put them on. I gave them to him and he put them on.

Q. Do you know whether he put them on right or wrong?

A. I do, sir.

Q. How do you know?

A. Because I verified them with the rough drawing I had.

Q. You took the plan and the rough drawing to see if they were correct?

A. Yes, sir.

Q. Now, is this drawn to a scale?

A. No. Well, it is drawn to a scale—no, there is no scale to that, it is just a sketch made and the figures put on.

Q. Is the distance between the two rails drawn to a scale in those various tracks that appear there?

A. No, they are not drawn to a scale.

Q. The distance between the switch and the rail upon either side drawn to a scale?

A. No, they are not, I say. No part of it is drawn to a scale.

Q. Now, you can see that middle line where the switch
136 purports to be, can't you, from there?

A. No, I can't.

Q. Won't you just look at that plan and see if your eye don't tell you that that middle line which indicates where the switch was is not altogether too near one rail according to the making?

A. I say it is not drawn to a scale.

Q. I am asking from your eye there, it is out of the way, isn't it?

A. Yes, it is out of the way. It is out of the center. The figures give that. It is nine inches out of the center.

Q. Is that marked nine inches out of the center, that is what your eye tells you?

A. The figures——

Q. Is that what your eye tells you the plan is?

A. The figures tell what it is.

Q. My question is, doesn't the plan indicate that it is a great deal nearer one rail than the other more than the figures indicate?

A. Well, that might possibly be because it is not drawn to a scale.

Q. Just look at it and give us your judgment?

A. I say it is. It does look so because it is not drawn to a scale. If it had been it would have been proportioned better.

Q. Who helped you about making these measurements?

A. My patternmaker.

Q. I mean the measurements made on November 2, 1901?

A. Thomas Hazel. He was the man that inspected the car loading.

Q. Where is he?

A. He is at Lyndonville.

Q. Where was the car?

A. At Lyndonville.

Q. Where was it when you inspected it?

A. It was there at the time of the accident.

Q. In the cornfield?

A. No, right on that track, had it placed there.

Q. Had it put back there?

A. Yes, sir.

137 Q. You wasn't there when the accident occurred?

A. No, sir.

Q. You don't know which of those two cars this man was on?
A. No, only what they told me.
Q. What he told you?
A. (Witness.) Who?

COUNSEL: Mr. Gokey?

A. No, I didn't see Mr. Gokey.
Q. You don't know which car he was on except what somebody told you?
A. The trainmen told me which car it was.

Mr. GEO. YOUNG: I omitted to ask the conductor the number of that car on which Mr. Gokey was riding. I should like to recall him for that purpose.

M. R. DAVIDSON, recalled by Mr. GEO. YOUNG:

Q. Mr. Davidson, as conductor, you made report of accidents occurring on the train?
A. Yes, sir.
Q. Will you state the number of the car which Mr. Gokey was on at the time he was injured?
A. 27,009.

Recross-examination by Mr. COOK:

Q. What makes you think it was 2,709?
A. That was the rear car on the siding.
Q. What makes you think so?
A. I know it.
Q. How do you know it?
A. Because I see it.
Q. See it where?
A. On the siding of No. 1. I see it on No. 1 siding before the engine went over there.
Q. You saw it before it was moved at all?
A. Yes, sir.
Q. Did you see another one there?
A. Yes, sir.
Q. And what was that number?
A. I don't remember now.
Q. You can't tell?
A. No, sir.
138 Q. Do you know where either of those two cars were going?
A. Yes, sir.
Q. Where?
A. They were going with me; I forget now where; they were going north.
Q. You don't know whether one was to go further north than Newport or not?
A. I think at Lyndonville and Newport——
Q. Usually you didn't leave cars between the two points?
A. Yes, quite often.

Q. One of those cars wasn't billed to be left anywhere between Newport and Lyndonville, was it?
A. I don't remember.
Q. Any idea?
A. No, sir.
Q. Now, if it was to be left, one of these cars was to be left between those two points, where would it be located in your train?
A. On the head end.
Q. Be put on the head end of the train?
A. Yes, sir.
Q. And separated from the car that was to be brought through to Newport?
A. Yes, sir.
Q. You say you think 2709, you know it was because you know that was the rear car, what makes you know that?

Mr. YOUNG: The witness said it was 27,009, and Mr. Cook says 2709, which leaves out one cipher of the car number.

Q. What was the number of that car?
A. 27,009.
Q. Do you think it was that number because of looking at your report that you made?
A. No, sir. Gokey said it was the rear car that he got struck on.
Q. Do you now have the number in mind because of looking at your report?
A. I have never forgot that car number.
Q. You never have forgotten that car number?
A. No, sir.
139 Q. And you didn't need to look at your report?
A. No, sir.
Q. You made the report?
A. Yes, sir.
Q. You looked at it?
A. Yes, sir.
Q. But you didn't need to?
A. No, sir.
Q. Is that it?
A. That is it, sir. (Witness was shown report.)
Q. You made this report and handed it in before you left Lyndonville?
A. Yes, sir.

Mr. GEO. YOUNG: If the Court please, it has been suggested that Mr. Knight, in his statement of the number on one occasion, stated the number the same as Mr. Cook did in his cross-examination, leaving out one cipher.

The COURT: That is all obvious enough.

Mr. GEO. YOUNG: If there is no question about it, I don't care to take any time, but if there is, I should like to recall Mr. Knight.

The COURT: No occasion to be any question, when any one says 2,709 for 27,009, anybody can see that they left out a cipher.

Mr. YOUNG: To avoid any debate about that later in the tran-

script I would like if the Court will permit to let Mr. Knight come back, so there will be no debate about what he testified as to that number.

The COURT: I don't think anybody would be misled by that, but you may.

Mr. COOK: We will concede that that is the number meant by the witness and by the counsel.

HENRY SWAIL, called for the defendant. Sworn.

Direct examination by Mr. GEO. YOUNG:

Q. Mr. Swail, what is your business?
A. I am a freight conductor.
Q. And for what road?
A. Boston & Maine.
Q. Where are you running?
140 A. Running at the present time between Lyndonville and White River Junction.
Q. What were you doing in November, 1901?
A. I was running a shifting engine in the Lyndonville yard; that is, I wasn't conductor, I was running the engine.
Q. Did you know of the accident to John Gokey?
A. I did.
Q. Where were you at the time of the accident?
A. I was between the place where the accident occurred and the water tank on the main line.
Q. And which direction from where the accident occurred is the water tank?
A. South.
Q. About how far from the place of the accident were you?
A. I was probably about fifteen rods.
Q. And were you on the main line or near the main line?
A. I think I was on the main line.
Q. What kind of a day was it?
A. It was clear, fair day.
Q. Did you see Mr. Gokey before he got onto the car?
A. I did not.
Q. Whether or no as he was there on the car he was between you and the target, the switch target to the cornfield siding?
A. Yes.
Q. From where you were could you see the cornfield siding switch target?
A. Yes, I could.
Q. How was it set?
A. It was set for the cornfield.
Q. And by that you mean that it was set crossways?
A. The target set crossways of the tracks.
Q. So that you could see the red side of the target full size from where you were?
A. Yes, sir.
Q. Where was Mr. Gokey when you first saw him?

A. He was on the side of the car, on the forward end of the rear car.

Q. How was he, won't you describe how he was on the car?

A. Well, I don't know as I can describe it exactly. I can
141 show you by taking the position in this manner, had his left foot, I should say, up in the stirrup and had hold with his hands. (Witness illustrates.)

Q. Whether he was part way around the corner or on the side when you saw him?

A. Well, when I saw him he was on the side.

Q. How near should you say he was to the switch target at that time?

A. He might have been two rods from it, in that vicinity.

Q. Did you see him when he was struck?

A. I did.

Q. Was he in the same position then?

A. I think he was. I don't think his position had changed.

Q. Was there anything that would have prevented Mr. Gokey from seeing that switch target if he had looked in the direction of it?

A. Nothing to my knowledge.

Q. You could see nothing from where you were that would obstruct his view?

A. I could not.

Q. There was nothing between you and the target that obstructed your view?

A. There was not.

Q. The cars that he was on were moving away from you, were they?

A. Yes.

Cross-examination by Mr. COOK:

Q. When you first saw Mr. Gokey, his left foot was in the stirrup of the car?

A. Well, I wouldn't state positively as to his left foot.

Q. I want your best judgment?

A. My best judgment is that it was.

Q. Where was his right foot?

A. It would probably be on the bottom round of that ladder, that would be the natural position of a man on the end of a car.

Q. Can you say whether he had both hands on the grab
142 irons on the side of the car, or whether one was around to the end?

A. I think his right hand was around to the end of the ladder.

Q. Supposing he was getting onto the ladder, whatever he may have been doing, in the position you saw him, with his left hand on the grab-iron and his left foot in the stirrup and his right hand and right foot on the ladder around the end, his back would have been directly towards the switch, wouldn't it?

Mr. YOUNG: I object to that hypothetical question. Every man of the jury can figure that out just as well as this witness can. He

don't ask him if it was, but he asked him if it was so and so, he says supposing so and so.

Mr. COOK: I will avoid that trouble.

Q. As he stood there as you say with his left foot to the stirrup, with his left hand on the grab iron, with his right foot and right hand on the ladder, what direction was his back?

A. I want you should understand that I don't distinctly state that he stood with his right hand on the ladder.

Q. But you gave that as your best impression, didn't you?

A. To the best of my knowledge that is the position he was in.

Q. If you say that is the position he was in, which way was his back with relation to the switch?

Mr. YOUNG: He says that would naturally be the position, but he don't pretend to say——

Mr. COOK: He says that is his impression.

Mr. YOUNG: He says he don't know, that he don't pretend to say——

Mr. COOK: He says his impression is that he stood as I have described. Now, I say if that is true, which way was his back with relation to the switch?

143 Mr. YOUNG: That is basing one hypothesis upon another hypothesis.

The COURT: That is all right enough.

Mr. YOUNG: We would like an exception.

Exception by the defendant.

A. His side would be toward the switch and back towards the main line.

Q. His side would be toward the switch and his back toward the main line. He would be right facing the car, would he?

A. Yes.

Q. Would his hands be like that? (Indicating.)

Mr. YOUNG: We would like an exception to these theoretical questions.

Q. Did you say that his hand in your best impression was around the end of the car and on the ladder?

A. That would be my impression.

Q. Do you say that his right foot, your best impression was, was around the end of the car and on the ladder?

A. I do.

DAVID WILLIAMS called for the defendant. Sworn.

Direct examination by Mr. GEO. YOUNG:

Q. What is your business?

A. Division engineer on the Connecticut and Passumpsic Division of the Boston & Maine.

Q. I call your attention to this plan here and ask if that represents the Lyndonville yard? (Def't Ex. B.)

A. Represents the north end of the yard at Lyndonville.

Q. And does this show the north end of the cornfield, so-called?

A. It does.

Q. There are various little marks running across the tracks here; what do those represent?

A. Those are the switches.

144 Q. I call your attention to this one near the extension, the northerly extension on the northeast, what does that represent?

A. That is the switch on the main line, known as the cornfield switch, leading onto the ladder track.

Q. I wish you would state, do you know the distance, Mr. Williams, at the point of that switch between the main line and No. 1 siding?

A. From the gauge side of the switch on the west of the main line at the cornfield to the center of the staff it is four feet and 63/100 of a foot.

Q. And what is the distance from the No. 1 siding to the center of the switch stand?

A. The distance from the gauge side of the switch to the center of the staff is three feet and 9/10 of a foot.

Q. What kind of a stand is that, Mr. Williams, high one or low one?

A. That is what is known as a high stand.

Q. I wish you would state the reason for using a high stand there and for locating it as it is located?

A. A high stand of course could be seen at a greater distance by an engineer approaching on his engine than a low stand can be seen, and for that reason this particular stand is used in that place, being on the main line and trains approaching it coming down a grade.

Q. It is a down grade coming from the north into Lyndonville yard?

A. From west Burke to Lyndonville is on a heavy down grade. Of course, as you approach the yard, the grade is not as much but there is a grade as you approach the Lyndonville yard. It is safer to use a high stand than a low one; that is, the engineer could see a high stand at a greater distance than he could one that was down to within three feet of the ground, especially in the winter time when snow is piled up, it is doubtful whether he could see a low stand at all.

145 Q. What do you say as to its location with reference to these two tracks being nearer the siding, side-track than the main line?

A. Well, it is a little nearer the siding than the main line; that is, the stand is not quite in the center between the tracks.

Q. Any reason for that there?

A. Well, I couldn't say that that was the reason that that was placed that way, but, as a general rule, it would be——

Mr. HOWE: We object to the general rule, your Honor.

Mr. GEO. YOUNG: We expect to show by the witness that, as a matter of engineering, the main line having much the most traffic,

should be so arranged that that is safe anyway, and that if the tracks in the yard crowd anywhere that that track, as a matter of good railroading——

The COURT: He may state.

WITNESS: As a general rule, in laying out switches it is best to favor the main line; that is, to keep the main line as safe as possible, because the main line is used by all trains, all through trains have got to pass that switch.

Q. I suppose trains on the main line move with greater speed than on the sidings?

A. Yes, they do.

Q. So that the substance of it would be that the protection of the traffic was better with the high switch stand and set far enough from that track to make the main line safe?

A. That is right.

Q. I want to call your attention a little more to this plan. These parallel lines running along, they represent what?

A. Represent two rails of the main line. (Def't Ex. B.)

Q. Now, this long figure here marked coal shed, and this part of a circle here?

A. That is the engine house.

146 Q. And these marks over here?

A. Those are different buildings, store buildings, coal shed.

Q. Do you remember what this track is called, is that the box shop track, is that what they call it? (Indicating on plan Ex. B.)

A. I think it is, but I am not positive about that.

Q. And here is a little circle?

A. That is the water tank.

Q. And just below it is this square marked Sec. house?

A. Yes, that is the section house.

Q. And this marked "ash pit" represents?

A. That is the ash pit.

Q. What is the ash pit?

A. The ash pit is where the ashes are taken away from the engine. It is a depression where the ashes are taken away from the engine.

Q. Is this plan drawn to a scale?

A. Yes, one inch to forty feet.

Q. How along in here (indicating), there is some little space between this extreme westerly track and the track next to it. Do you remember the character of the ground in between those two tracks?

A. That westerly track is depressed; from memory I should think maybe six feet from the main line tracks.

Q. Whether it would be a reasonable arrangement to spread out those tracks more right in there?

A. You could build the yard all over if you want to.

Q. But that would be a matter of considerable expense, would it not?

A. Yes, sir.

Q. Along in here between the tracks here is it a common thing for the snow to accumulate between the tracks during the winter in this northern country?

A. Anyone that has lived here can see that for themselves.

Q. It piles up between the tracks?

147 A. Yes, piles up between the tracks. Of course, it is very common here for it to pile up.

Q. So that between the tracks you frequently get more depth of snow than you would get on a level?

A. Yes, you do.

Q. And that requires a high switch target to make it visible to the engineer?

A. As I said, the high switch target is safer.

Q. Mr. Williams, I show you Def't's Ex. C. and ask what the switch is that is shown in the foreground of that picture?

A. That is the switch known as the cornfield switch.

Q. I show you Def't's D. and ask what the switch is besides the car?

A. That is the same switch taken from another direction, opposite direction.

Q. I show you Def't's Ex. E., and ask you what the switch is shown there beside the car?

A. That is the same switch taken from another side (or site).

Cross-examination by Mr. Cook:

Q. When was your plan made, Mr. Williams?

A. I verified that plan last winter, the exact date it was made can't tell you.

Q. Was that plan made before the change of this switch from one side to the other, or since?

A. That plan shows the tracks as they exist to-day.

Q. I understand that. Was the plan made, that plan, since the switch was changed or before?

A. I can't tell you whether the switch was changed or not. I don't know. I say the plan was made as it exists to-day, or as it did last winter. I don't know when the switch was changed, so I can't tell you.

Q. When a change is made in your yard and you go to work and make a blue print, do you make an entire new blue print or

148 do you rearrange the old one?

A. We take the old work as far as it is correct.

Q. Now, Mr. Williams, in your business as engineer, does it come within your duty to consider how close to a track a switch should be, or how far away it should be?

A. As a general thing that is left to the roadmaster.

Q. That is no part of your duty? You don't locate switches, do you?

A. I do sometimes. When I am called on I do.

Q. And do you do that in your capacity as engineer?

A. I do.

Q. And do you locate them in their distances from the track?

A. I locate a switch when I am called upon and use my best judgment in locating that switch.

Q. Now, in locating a switch when you are called upon, do you locate the place in the line where the switch is to be, or do you go further than that and locate the place of the switch stand and the kind of a switch stand?

A. I locate the frog, and then by locating the frog, as a general rule the roadmasters follow, it locates the switch. All I do is to locate the frog because in locating the frog it locates the switch.

Q. It doesn't locate the distance of the switch from the line, does it? the target?

A. If you will let me explain, in locating the switch, or locating the frog, I always use my best judgment in doing it, taking everything into consideration—that is my answer to it.

Q. You have said that you, in the performance of your duty, locate the frog?

A. Yes.

Q. Does that have anything to do as to determining how far from the rail the switch stand shall be?

A. Well, in locating the frog I know using a certain number of frog that the stand has got to be so many feet away. Therefore, in locating the kind of a frog, I would decide or measure to see where that stand was coming, and then I usually can tell whether the stand is going to interfere with any of the other side tracks or anything around.

149

Q. How far from the stand is the frog usually?

A. It depends on the number of frog.

Q. Approximately?

A. Well, they vary, approximately, around from fifty or sixty feet way up nearly to one hundred.

Q. So that when you locate a frog you go fifty or one hundred feet, or whatever the distance may be required, and see if there is a good place to set the switch stand, do you?

A. Yes, sir.

Q. Do you have to do with seeing how far from the track that should be, or how close it should be to the track itself—is that a part of your duty?

A. Well, I have just said that it was, because if I am called on to locate a switch, I have got to take into consideration those things, so that it becomes a part of my duty to see where that stand goes.

Q. It is a part of your duty to see that there is abundant room there for the location of the stand, is that what you mean?

A. It becomes my duty to see if it is a safe place to put a stand.

Q. A suitable and a safe place to put a stand?

A. Yes, sir, but I want you to understand that I don't locate only a very few switches, those in difficult places where the roadmaster can't decide with his eye, and calls on me, I go there and do the best I can.

Q. Did you locate this switch?

A. No, sir.

Q. When you speak about locating switches so they will be safe for the main line, what have you reference to, safe for the cars?

A. Well, for the cars, for the passengers that might possibly be

looking out or leaning over from the side or something of
150 that kind, all those things will be considered.

Q. You don't have reference to the men riding on the outside of a freight car when you speak of main line trains?

A. We understand that trainmen have got to do their work in the yard.

Q. Do you have in mind, when you speak about the trains running through on the main line, the safety of men upon the side of cars?

A. Why, we take those things into consideration, of course, as far as we can.

Q. You understand it is your duty to do it, don't you?

A. Yes, it is our duty to make things as safe as possible for all employees and the travelling public.

Q. How far does the ordinary freight car extend outside of the line, the rail?

A. Well, the ordinary freight car is about approximately nine feet and the rails cover about five feet, so there will be two feet on each side, approximately.

Q. Substantially the car stands over a couple of feet?

A. Yes, maybe a little less than that, I haven't got any measurements.

Q. If you are going to locate a switch so as to be safe for cars to pass and men on the sides, and so on, and wherever they may happen, you have to take into consideration the distance that car extends over the track, don't you?

A. Yes.

Q. And you take into consideration two feet, do you?

A. Yes.

Q. Now, how much additional room do you give between the car and the switch?

A. The tracks are seven feet apart and you can't have any more room than there is there between the tracks.

Q. If they are made eight feet apart you have got more room than you have if seven?

A. That is very true.

151 Q. If you have got nine feet you have got more room than you have if they are eight?

A. Yes.

Q. I suppose railroads fill land, don't they?

A. Yes.

Q. There is a little sag there so that if the tracks were to be moved out further west you would have to fill in a little there, wouldn't you?

A. Be necessary to fill in, yes.

Q. In order to make that switch as safe for the No. 1 line as it was on the main line the railroad company would have to spend some money, a few dollars, to fill in there and perhaps rearrange some of the tracks, wouldn't they?

A. It would cost money, couldn't do it for nothing, of course.

Q. Now, I want to ask you, Mr. Williams, and I would like to have you confine your answer to the question. When you do lay

out a switch what is the distance that you consider a safe distance from the line for the switch staff?

Mr. Young: Do you mean in the yard or on the main line?

Mr. Cook: Well, if there is a difference, I want to know it.

A. If there was plenty of room I would put the switch so that it would clear six feet, if there was plenty of room. That is my rule, six feet from the rail.

Q. From either rail?

A. From the nearest rail.

Q. Do you know what the standard length of switch rod is?

A. The exact standard; no, I couldn't tell you the exact standard; you have got to clear six feet.

Q. Were you here when Mr. Sherwin testified?

A. I was.

Q. Did you hear him say that four feet was the standard
152 length of a switch rod from the switch, what was the rule?

A. He gave two measurements; I didn't catch what he meant.

Q. You don't know of any standard length of switch rod?

A. Well, there is a standard.

Q. Do you know what it is?

A. Well, I say that it is so that it will clear six feet; the staff will be six feet from the rail.

Q. From the nearest rail?

A. Yes.

Q. And that is the safe rule?

A. That is the standard when there is plenty of room.

Q. When there is plenty of land?

A. Yes.

Q. You have got some of those up and down this line?

A. I think you will find some.

Q. Not very many, will you?

A. Go out and measure and you will find some.

Redirect examination by Mr. Geo. Young:

Q. There is a difference, some variation, in the width of cars, is there not?

A. There is.

Q. There is also a variation in the distance that you set switches from the tracks, is there not?

A. There is.

Q. That depends upon the room that is available for the construction of your yards?

A. It does.

Q. In a great many cases switch stands have to be set within less than six feet from the rail, do they not?

A. Certainly, there are a great many, haven't got the room.

Q. Now with reference to the side tracks, and the main line, which would you set the switches nearer to, which do you set switches nearer to, side tracks or main lines?

The COURT: He has already stated that.

Q. Mr. Williams, what is the custom in the laying out of yards with relation to the location of switches on the side tracks whether or not they are located as far from these tracks as you would
153 locate switches from the main line?

A. As a rule they are not.

Q. Now, why is that?

A. Well, in yards, as a general thing, the space is limited.

Q. And how about the movement of the trains, as to whether they move with the same rapidity or not?

A. Well, of course, they move slow in the yards, much slower than they do on the main line.

Q. And the yard men, of course, are supposed to be familiar with the yards in which they are working, are they not?

Objected to.

The COURT: That don't seem to be an engineering question.

Mr. GEO. YOUNG: It occurred to us that if in laying out, considering these things that was one of the elements that they considered——

The COURT: He has already answered the elements.

Recross-examination by Mr. COOK:

Q. You are the engineer of the road and have been for a good many years?

A. Yes, sir.

Q. You know the quantity of land that they have got there at Lyndonville?

A. Well, I have an idea.

Q. Don't you know where their lines are, substantially, east and west there?

A. I do on one side, but I can't say that I do on the other.

Q. Don't you know on the west side substantially where the land of the railroad company goes?

A. No, sir, I do not.

Q. Do you know whether they have got any land west of their tracks?

A. I think they have.

Q. Don't you know that they have got an abundance of it?

A. Well, they have got land. You have asked me where the line was. I say I don't know where the line is.

154 Q. Don't you know that they are not limited in the yard at Lyndonville with relation to land to widen out their tracks and locate switches properly; don't you know that?

A. Why, they have got land there.

Re-redirect examination by Mr. GEO. YOUNG:

Q. Mr. Williams, without entirely remodelling their yard there could they get any more space between the main line and No. 1, without remodelling the entire yard?

A. No, they could not.

Re-recross-examination by Mr. COOK:

Q. You don't mean you would have to touch a single track in the cornfield, do you?

A. Well, that switch is not in the cornfield.

Q. That switch is west of the main line, isn't it? That man was injured while riding on a car on No. 1 siding, wasn't he, as far as you understand it?

A. Yes.

Q. And he was west of the main line?

A. Yes.

Q. If you were to have more room for that switch to be operated you would simply have to put the track No. 1 and the other tracks further west, wouldn't you?

A. Wouldn't that be remodelling the yard?

Q. A part of it, yes.

A. Well, that is it. You have answered the question yourself.

C. H. CLARK, called for the defendant, sworn.

Direct examination by Mr. GEO. YOUNG:

Q. Mr. Clark, you live in St. Johnsbury?

A. Yes, sir.

Q. And you are a photographer?

A. Yes, sir.

Q. I show you Defendant's Exhibit D and ask if that is a picture that you took?

A. Yes, sir, it is.

155 Q. Will you state the distance that the lense of your camera stood from the switch which is shown by that picture? That was taken in the Lyndonville yard?

A. It was, yes, sir. The distance from the lense to the target there is forty-one feet.

Q. In which direction were you looking?

A. That was looking north.

Q. I show you Defendant's Exhibit C and ask the distance that your lense was from that switch target?

A. The nearest one to the lense, that is fifty feet.

Q. And that was taken in the Lyndonville yard?

A. Yes.

Q. Which way was you looking?

A. Looking south.

Q. I show you Defendant's Exhibit E and ask you how far the lense was from the switch stand there?

A. That is forty feet.

Q. Looking in which direction?

A. Looking south.

Q. And do all of those pictures show the same switch-stand in the foreground?

A. Yes, they do.

Q. And are these pictures a correct representation of the objects which they purport to show there?

A. Yes, just as correct as you can make them.

Mr. GEO. YOUNG: We offer these Exhibits C, D and E.

The COURT: Being testified about as they have been they are already in.

Cross-examination waived.

[Defendant rests.]

156 *Plaintiff's Rebuttal.*

Mr. COOK: We want to introduce the report that Mr. Davidson said he made. We desire to offer it. I don't know but they object. If they do, why that is another matter.

The COURT: I don't hear them object.

Mr. YOUNG: We do object until we find out whether that is the original report or not.

The COURT: Take it and show it to the witness.

Mr. COOK: The only portion of the report that I care to read in this report is the "cause of accident, riding on side of car."

Mr. YOUNG: We object to any part of that report unless they put in the whole.

Mr. COOK: I will, I just as soon read the whole of it.

"BOSTON & MAINE RAILROAD.

Telegraphic Report of Accident to Persons. Pass. Division.

Lyndonville Station, No. 2nd, 1901, 2:20 o'clock p. m.

A. Train No. 87.
B. Engine No. 294.
C. Place accident, Lyndonville yard.
D. Date and time of accident. No. 2, 2:20 p. m.
E. Who injured and address. John Gokey, West Derby, Vt.
F. What was done with injured person? Taken to Dr. Copeland.
G. Extent of injury. Ankle on left foot badly crushed.
H. Passenger, employee, trespasser or traveller on highway. Employee.

157 I. Cause of accident. Riding on side of car and struck on the back by switch target knocking him off car, wheel passing over left ankle.

J. Nos. and initials of car or cars causing accident. M./27009.
K. Car or cars will be left at Newport, Vt.
L. Were appliances and premises thoroughly inspected after accident. Yes.
M. Remarks.

(Signature) D. W. DAVIDSON, *Cond'r.*"

JOHN N. GOKEY, recalled by Mr. Howe.

Q. I want to have you tell the jury how far, in your judgment, it was from the side of the car to the target on the switch stand at the time you were injured?

Mr. YOUNG: I think that is in evidence clearly by actual measurements. Now does it add anything by guess work about it?

Mr. HOWE: I don't think we are obliged to be bound by their measurements.

The COURT: No, I don't think it is binding if you wish to ask him.

Q. Now you may tell the jury how far from the side of the car to the target on the switch stand?

A. Well, in my judgment it was at least twenty to twenty-four inches.

Q. Now what makes you arrive at that conclusion?

A. Why from the position I was in and where I was struck, it must have been all of that.

Q. Anything else?

A. Why my body is at least a foot thick, and I was out away from the car, and it must have been at least twenty or twenty-four inches.

Q. Now do you know whether a stock-rack car, such as
158 you were on at the time you were injured, is narrower or wider than the ordinary freight box car?

A. It seems to me they are narrower.

Mr. YOUNG: We object to this speculation. The whole answer is just as I anticipated, pure speculation. Now, if he has measured those cars so that he has any knowledge, we don't object to it.

The COURT: Do you care to take it?

Mr. HOWE: I don't know as we care to press that question, your Honor.

Q. Now you tell the jury a little more fully, if you please, how much your body was curved outward from the car at the time you were injured?

A. Well, it must have been curved out at least from eight inches to a foot.

Cross-examination by Mr. GEO. YOUNG:

Q. When did it first occur to you that there was twenty inches between that switch target and the car?

A. It always occurred to me that it was about that.

Q. From the time you first saw that switch target there you thought it was about twenty inches to the side of a car?

A. Well, I have always thought so since I have been struck.

Q. You have always thought so ever since you first saw that switchstand there?

A. No, sir, I have always thought so from the time that I was knocked off from there.

Q. You have never measured that distance from the car to the switch target?

A. No, sir.

Q. How far did you think it was from the other track? the main line to that switch target?

A. Well, I never measured it.

Q. What was your judgment about that?

A. I never went by it, I never happened to stand there.

159 Q. Have you been there since the accident?

A. Yes, sir.

Q. And looked it over?

A. Yes, sir.

Q. What is your judgment now as to the distance from that track to the switch target?

A. Well, I haven't any idea, it must be——

Q. Have you any idea — the distance between No. 1 and that target from having been there and looked at it?

WITNESS: Between No. 1 and the target.

Mr. HOWE: What do you mean, the rail or the side of a car?

Q. Have you any judgment as to the distance from the rail to that switch target, the rail of No. 1, you were the nearest on the No. 1 track, nearest the switch target. Have you any idea about that distance?

A. It is about forty-seven inches.

Q. How far apart are those tracks there?

A. I don't know.

Q. Any judgment about it?

A. Well, between six and seven feet.

Q. And you noticed before the accident that the switch target stood nearer the No. 1 siding, didn't you?

Mr. HOWE: I object to that, that has all been gone over. I didn't ask him anything about that. It was disposed of this forenoon, we understand.

The COURT: Yes, it was. He was inquired about that on re-examination and recross-examination, and it hasn't been opened.

Q. Did you ever see a car next to that switch-stand on the No. 1 track?

A. No, sir.

Q. Have you since the accident seen a car on there?

A. No, sir.

Q. So that you have never looked at that distance to have any judgment about it. It is mere speculation. You don't have

160 any judgment from seeing a car next to the switch-stand? Just answer the question. You have no judgment as to that distance from ever having seen a car next to that switch-stand on the No. 1 track?

A. No, I never see a car there.

[Plaintiff rests.]

Mr. GEO. YOUNG: We understand that the plan is in from having been testified about, if not we desire to offer it. (Ex. B.)

The COURT: Oh, yes.

[Defendant rests.]

JUNE 2, 1905.

Defendant's Motion for Verdict.

Mr. GEO. B. YOUNG: We desire to move for a verdict at this time on the following grounds:

First. That no negligence on the part of the defendant is shown either in the location, the height or the construction of the switch-stand or switch target which plaintiff claims contributed to his injury.

Second. On his own evidence plaintiff was guilty of negligence which contributed to his injury.

Third. The whole evidence fails to show a cause of action.

161 Fourth. The whole evidence fails to establish in favor of the plaintiff the right to recover.

Fifth. On the whole evidence the plaintiff is not entitled to recover.

Sixth. The risk and danger, if any, resulting from the location and height of the switch-stand and target involved in this case was a risk of the employment which plaintiff assumed.

Seventh. The plaintiff knew or ought to have known the proximity of the switch-stand and target to the track.

Eighth. The plaintiff knew or ought to have known that the switch-stand and target was so close to No. 1 track that he could not pass it on the side of the car, and knew or ought to have known the danger of attempting so to do.

Motion argued.

The COURT: These things happen so frequently that we know about them, a good many of them, and without going over this to discuss fully, for the reason that the trial does not stop here, I deem it better to say that these are questions for the jury under our system of procedure, the trial of fact has to be by jury, and so I see no way but to submit this case to the jury. I think it would be wrong to take it away.

Mr. GEO. YOUNG: The Court will allow us an exception to the overruling of the motion.

The COURT: Certainly.

Exception by defendant.

During Mr. Cook's argument before the jury.

Mr. YOUNG: I want an exception to that argument. There

162 is not a particle of evidence that there is any record in existence that shows when that was done.

Mr. COOK: What I say to you is this, if it is a fair argument, railroad corporations and all other corporations and all other large busi-

nesses do things by the book. Now there is a pretty fair assum-tion that these repairs that were made there—isn't it fair for you to assume that there was some record about their business that would show what the fact was—when they were made?

Mr. YOUNG: I want an exception to the amendment of his argument.

The COURT: There won't be any exception until there is some decision of the Court about this. This is all well enough.

Defendant's Requests for Instructions to Jury.

1. A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another and anyone who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risk of that condition of things.

2. A master may conduct his business in a dangerous way, provided it be not unlawful, and does not interfere with the rights of others, without liability to his servant, who has sufficient capacity to comprehend the danger and voluntarily incurs it.

3. The defendant owes a duty to the public in the operation of its trains greater than that to its employees. In determining whether defendant was negligent in locating this switch as it did, you should consider all phases of the matter, the safety of trains, as well as the safety of employees. You should not find the defendant guilty of negligence in erecting this switch stand as and where it did unless you find, from the evidence, that some other kind of switch stand or some other location of the switch stand would have been safer for employees and equally safe for the trains and that no new danger in the operation of the road would be introduced thereby.

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4. The plaintiff's evidence fails to show that any other switch stand or any other location thereof, all things considered, would have been safer or better.

5. The defendant is not to be regarded as negligent in erecting and maintaining contrivances or things for use in the operation of its road for the reason that they are dangerous to the persons operating the trains.

6. Because there was danger in the location of this switch-stand, it does not follow that the defendant was negligent in using the kind of switch stand it did use or in locating it as it did.

7. If this switch-stand was placed so near the No. 1 side track as to be dangerous to one riding past it on the side of a car, and plaintiff knew or by the exercise of due care and diligence ought to have discovered that it was so placed, he assumed the risk resulting therefrom, and for the injury resulting from such location of said switch-stand, plaintiff cannot recover.

8. Plaintiff was bound to use his senses and he assumes such risk as are incident to the employment from causes that are open and obvious, the dangerous character of which he has had an opportunity to ascertain. This assumption embraces all such

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risks arising from his employment as he knew, or in the exercise of a reasonable degree of prudence, might have known to be incident to his employment.

9. Plaintiff is bound to exercise the care and caution of an ordinarily prudent person, in the circumstances, to avoid injury. Any failure on his part to observe such care is contributory negligence on plaintiff's part, and if it contributes in any degree to his injury he can not recover.

10. Contributory negligence may consist of omissions as well as of affirmative acts.

11. Plaintiff was bound to do all that a reasonably prudent person would do to prevent injury. If he had looked toward the switch target at any time before he got onto the car or before the car reached the target he could have seen it and have avoided being hit by it. If his injury is due to any extent to his failure or omission to look in the direction of the target and to see it, then his failure so to look and see is contributory negligence that bars his recovery, and your verdict should be for the defendant.

12. The burden is on the plaintiff to establish every fact necessary to entitle him to recover by a fair balance of testimony.

13. Under this rule he must satisfy you by a fair balance of testimony that defendant was negligent, and that his negligence
165 was the proximate cause of his injury; that plaintiff had not assumed the risk of the switch stand located where it was, and that he had not been guilty of any negligence on his part, either of omission or commission which in any way contributed to his injury.

14. The evidence in the case fails to show facts sufficient to constitute a cause of action in favor of plaintiff and against defendant and your verdict should be for defendant.

Charge.

WHEELER, *J.:*

GENTLEMEN: Perhaps I do not need to tell you that merely because the plaintiff got hurt on the railroad, he is not entitled to recover, for that is not so. He is only entitled to recover if the defendant is shown to be responsible for the injury to him by having done something, or omitting something that ought not or ought to have been done which caused the injury to plaintiff, without his causing it himself, and he must prove it to make out a case, in order to be entitled to recover; that the plaintiff always has to do unless the defendant admits something. The plaintiff brings the suit, he must maintain it by the evidence; sufficient evidence in law to show by a fair balance of proof that he has brought, that he has a just claim for damages under the law.

Now, in this case, what the plaintiff complains of, is the danger, the dangerous character of this switch-stand, or target to those employed about it as he was employed. Now it belongs to every employer, belongs to every railroad to provide a reasonably safe place

for the employees to work in, reasonably safe place, reason-
166 ably safe appliances and reasonably safe arrangements—that belongs to the employer to do. You notice the word I use, "reasonably," reasonably safe for the purposes, under the circumstances, under all the circumstances, what would be reasonably required to make a thing safe for the use to which it is to be put, and safe for those who would be employed to work around it. Now, that was the employer's duty, that was the railroad's duty, that the road, the railroad yard, the arrangements at Lyndonville, the tracks running into the yard, and the side tracks fixed for doing the business of the railroad, be reasonably safe.

Now, in view of the whole, all the circumstances, the question that is for you is, was the switch-target as it was placed there beside this track No. 1, between that and the main line, reasonably safe for the plaintiff and others to work about as they would be expected to. Reasonably. Take the whole thing into view, take the whole situation into view, the main track, track No. 1, the switch between, and where it was placed, closer to track No. 1 than to the main line, within, somebody said, thirteen inches from that target to the grabiron, or whatever it is, they told the distances to the rails—they don't all agree about it. You will look right on the evidence, the testimony of all the witnesses, and see how near it was, and see whether you, as reasonable men, under all the circumstances, would leave that yard in that way there to be used by trainmen, by the brakemen. Would you think it safe if you knew just how near it was, just how near the car it was, just how men would be riding along on a car or getting on when it was necessary? Supposing you knew all about that, all of these circumstances, and the convenience of plac-
ing it in any other place for the purpose of doing what was re-
167 quired to be done by it. Now, look at it as reasonable men, to be fair to the defendant and fair to the plaintiff. Do you think that was reasonably safe, a reasonably safe place to put a man to work at? Should you think it was if you was a brakeman, calling yourself reasonable men, a reasonable man, as brakeman? Would you think it was safe if you knew all about it and knew what a brakeman would know, or might not know about it? Look at it either way, both ways, from the standpoint of the railroad company and with their men in charge, and from the standpoint of the trainmen. Was that a safe thing to be put right there near the cars on which men would work, the frequency with which it would have to be used, the danger there would be from it? And say whether that was reasonable or not, reasonably safe on the whole, and if you think it was, return a verdict for the defendant, because there is no fault of the defendant, and the plaintiff has not got any case, has no grounds of complaint. So, if that is the way you look at it, that is the way it seems to you, looking at the whole thing on all the evidence, return a verdict for the defendant. But if you don't think it was, and think it was unreasonably dangerous, unreasonably careless, likely to harm somebody, so that you can say it was not a reasonable thing to have there in that place, ought not to have been put so near the track, or so high up, or both, take it just as it was—if

you say that was unreasonable, then if that is what injured the plaintiff, if that is what caused the injury to him, then your verdict should be for the plaintiff, unless it appears to you that he brought this on himself by his own want of care and prudence by doing what he did do when the injury was caused, by causing the injury to himself, instead of its being their fault, so that you can say
168 it was his fault, either in whole or in a substantial part. If you can say he was to blame for it, if that appears to you to be the case, that he was to blame for it, then your verdict should be for the defendant. But you are to look at that in view of all the circumstances, what he had to do about it, what he had a right to expect about it, how much he ought to have looked to find out about it, and see if there is anything in his conduct that shows that he brought that in whole or in part upon himself. Now, was he in fault in getting onto the car? You heard his reason for getting onto the car or trying to get on at that time, or starting to get on. Was that prudent. You heard what he said occurred. The brake was on. It squealed as he expressed it, so that he knew the brake was on. He said it was the business of the brakemen always to let the brake off and so he started to let that brake off. He said he understood that was the duty that belonged to him. Now was he right about that, and was it the proper thing for him to do to undertake to get onto the car just as he did try to? If it was, then that don't defeat his claim. If he was all right about that, that don't cut him off from recovering in this case. Then was he in fault in not knowing about the danger of this switch from what had occurred and from what he saw or might have seen before that time about it. As a prudent man ought he to have known that that switch was dangerous before that time? Take what the evidence shows he did know or had a chance to know about it. Some of the witnesses say that he set the switch himself, that he actually set it. Would that warn him just setting the switch, would a prudent man know from setting the switch as it was, whether it was too near the cars to be safe to try to get onto a car when going fast.
If he did set the switch he might know, if he didn't set the
169 switch why then that wouldn't inform him. I don't understand him to say anybody told him. It was there, he could see it, and he could tell whether it was a thing so dangerous in itself, the danger of which was so obvious and plain, that a workman about his duties would know by looking at it? Would the eye tell him that was a switch to look out for, because it was too near the track to be safe to mount a car while the car was going by it. Now, ought he, as a prudent man, to have known that from what he could see and what he did see, what he did know about it. As reasonable men, put yourself in his shoes. If it was as it was over the other side of the track as it was before, then it was safe, all right enough he said before, and he didn't know but what it was as it was here. Ought he to have known, ought a reasonably prudent man, a prudent man to have known from what he could see and what he did and what he observed, that that was a dangerous thing to look out for? If so, and he didn't look out for it, the verdict

would be for the defendant. But if not, if he was not in fault about that, that is, the fault of a prudent man, a prudent workman, why that don't cut him off. That don't cut him off from recovering if it was a wrong thing and a dangerous thing to have there and caused the injury to him.

This evidence is not very voluminous. You see how it was and you can pass on that simple question in the light of all the circumstances as to whether it was a dangerous thing, not a safe place, not reasonably safe. Then if not, was he in fault, that is, did he lack the conduct of a prudent man, and that brings this on him in whole or in part. If so the verdict will be for the defendant. If it was all safe it would be for the defendant. If not, why then,
170 if it was dangerous, if it injured him without his fault, then your verdict should be for the plaintiff.

My attention has been called to the burden of proof. As I remarked in the outset, the plaintiff must make out his case. By the "burden of proof" we mean the balance of proof in a civil case. In a criminal case it is proof beyond a reasonable doubt. That is, we don't punish anybody for a crime unless it is proved beyond a reasonable doubt. But in a civil case it is a balance of proof. Which way do you think, do your minds balance, which has the preponderance? To be preponderance in the plaintiff's favor he must have proof enough to tip the scales in his favor, so that you can say on the whole it is most likely he is right. If that is so that makes out the balance of proof.

Now, on this claim of showing that this was a dangerous thing, and showing that that caused the injury to him, the burden of proof is on him, so he must make the balance tip his way, and if it is just even, just as likely to be one way as the other, then it don't tip his way, and the verdict should be for the defendant. But if it is more likely to be as he claims, why then your verdict as to that should be for the plaintiff.

Now, when you come to the question of his contributory negligence, bringing it on himself—if the plaintiff makes out his part of the case, then the burden is on the defendant to show that he contributed to the injury. But it is by just the same preponderance of proof. If it is just even, why then it don't tip the defendant's way. If it balances, or does tip that way, more likely to be that he was in fault than otherwise, why then they have made it out, if not, they haven't. That is, the burden is simple. The plaintiff must prove his cause of action, prove the defendant was in fault,
171 and prove that it injured him by a fair balance of proof. If he has made that out, in order to defeat it the defendant must show by the same fair balance of proof that it was his own fault, that he brought it on himself. If it does not, the case is for him. It is a simple thing when you get to it and understand it. The main question of the whole being, who is to blame for this man breaking his leg. If the plaintiff has shown the defendant at fault by not providing a reasonably safe place, and appliances and arrangements, practically he has made out this part of the case. If he brought it upon himself, by being careless about getting onto the

car, by being careless about knowing what was there, so that his own carelessness or negligence brought it on himself, why then he would have no claim on the defendant. When you have decided those questions which way will your verdict be? If your verdict should be for the defendant, then there will be no question about damages. If for the plaintiff, the defendant is responsible for this injury to him, then the question will arise as to how much the damages are. How much the plaintiff is entitled to recover. Part of it you can figure out very easily, how much he lost in wages for the time he was confined. After he got out, you have the time he got employment up to now, you can tell that. That you can figure out. You can estimate something how much he would lose in the ability to earn money from now forward, and put it all together. That is not very difficult. But if he is entitled to recover he is entitled to recover a fair compensation for what he suffered, for his pain. What is fair? What is right? What would be a fair compensation for losing his limb, so much of it, going without it and having to go without it from then up till now and from now on as long as
he is likely to live. That is, how much is the loss of so much
172 of his limb? What would be a fair compensation for that?

Now it is not what you would have it done for. It is not a cash article. It is not a subject of trade. If you went to fix a price on what it should be done for that would be perhaps out of all reason. The situation is that it is done, has happened to him. It can't be avoided. It is there. What is the fair compensation for that so far as money can compensate and reasonably ought to compensate for that thing? What is about right between man and man in your view, as reasonable men looking right at it? Supposing he is entitled to recover, what is about right for the injury he sustained? Whatever would be about right for that purpose he should have it. For the pain suffered, the inconvenience, deprivation of his limb, as he has had it and is likely to have it hereafter. Consider his age. Of course nobody knows how long he will live. We do not know how long he will live, but you have some idea, some expectation, and take it as it is, just as you see it. What is a just and fair compensation? Something that won't do any wrong to the defendant and not do any more than right to him. That is the true measure. And add it all up. It rests with you in your judgment as men of good judgment, sound discretion, reasonable men. Look at this evidence, look at the whole thing and do what is right. When you have done that, that will be just doing your duty.

Nothing occurs to me that I can say to you to help you any more about this. It rests with you. You ought to do what you think is right on the evidence concerning it.

Mr. Geo. Young: If the Court please, we would like an exception to the refusal of the Court, omission of the Court to grant our first request.

173 The Court: I think that is just about complied with. Do you think there is anything short there, Mr. Young, in submitting this case to the jury?

Mr. GEO. YOUNG: It didn't seem to me, as I listened to the charge, that that was complied with in substance.

The COURT: If you think it isn't, note an exception, that is all. We don't want to note an exception to anything more than where you have really some ground. What more do you think should be said about that?

Mr. GEO. YOUNG: We think that just what we have said in the request covers it. I didn't understand the Court to say anything to the jury which particularly calls to their attention the fact that these things are questions together and necessarily so, so that the risk of those things would be assumed.

The COURT: I will note an exception to the difference, whatever there may be.

Mr. GEO. YOUNG: We would also like an exception to the failure to comply with our second request, and to what the Court said on that subject.

The COURT: That is the same.

Mr. GEO. YOUNG: We would like an exception to the failure of the Court to comply with our third request.

The COURT: The same, so far as there is any difference.

Mr. GEO. YOUNG: Also to the failure of the Court to comply with our fourth request; also an exception to the failure of the Court to comply with our fifth request.

The COURT: Well, that is not complied with.

Mr. GEO. YOUNG: To the failure of the Court to comply with our sixth request; also to the failure of the Court to comply with our seventh request.

The COURT: That is for the jury. If you think there is any difference, I will note an exception.

174 Mr. GEO. YOUNG: We would like an exception noted to that and what the Court said on it.

Also an exception to the failure of the Court to comply with our eighth request.

The COURT: The same about that, that it is complied with so far as I know.

Mr. GEO. YOUNG: We would also like an exception to the failure of the Court to give our ninth request in so far as it varies from what the Court did say on that subject.

The COURT: That is the way I have noted all of these.

Mr. GEO. YOUNG: To the failure of the Court to give our tenth request; also to the failure of the Court to grant our eleventh request; also to the failure of the Court to grant our twelfth request.

The COURT: Where is the shortage about that? The burden is on the plaintiff to establish every fact necessary to entitle him to recover by a fair balance of testimony.

Mr. GEO. YOUNG: The shortage in that would be this, as it seems to us, that he should establish that he was free from contributory negligence, and the Court instructed that he was simply bound to establish negligence on the part of the defendant.

Also to the failure of the Court to grant our thirteenth request; also to the failure of the Court to grant our fourteenth request.

The COURT: Well, that would obviate all others. Have noted that before.

Mr. GEO. YOUNG: We would also like an exception to that portion of the charge in which the Court instructed the jury that the burden of proof was on the defendant to show that the plaintiff was guilty of contributory negligence.

Mr. YOUNG: On that subject I would like the further exception to that part of the charge to the omission to tell the jury that
175 this proof of negligence could come from the plaintiff's evidence as well as the defendant's.

The COURT: I am not taking requests now, no new requests to charge.

Mr. YOUNG: I mean that as a part of the exception to what the Court said on the subject.

Mr. GEO. YOUNG: We would like an exception to what the Court said in the charge on the subject covered by our first request.

The COURT: You may specify the part of the charge to which you want to note an exception without reference to a subject that is outside the charge. Any part of the charge you want to except to why note it, but not in that form. What was the language exactly, what you except to.

Mr. GEO. YOUNG: We except to what the Court said with relation to its being the duty of the brakeman to let off the brakes.

The COURT: What is the expression that you except to.

Mr. GEO. YOUNG: I doubt if I could state the exact phraseology the Court used.

Mr. YOUNG: I want an exception, if the Court please, to what the Court said as to the location of the switch-stand and target being reasonably safe where it stood so near to track No. 1. On that point as to the way the Court framed his instructions as to its being reasonably safe where it stood so near track No. 1. And then to what the Court said when he reversed the statement, what he said as to its being unreasonably dangerous where it stood.

And I want an exception to the way the Court framed his instruction as to the fault or negligence of the plaintiff contributing to his injury, because the Court did not, in addition to what he did say, suggest that if it contributed in any degree—I understood the
176 Court to leave that general that if his fault or negligence contributed to the injury——

The COURT: To the degree of plaintiff's negligence.

Mr. YOUNG: We also want an exception to what the Court said as to the plaintiff's setting this switch not being notice to the plaintiff of its dangerous proximity to the track. The substance of what you said was, as I get it as you were going along, that it was for the jury to say whether or not the setting of the switch would give him any notice as to its proximity. We insist as a matter of law if he set that switch, he must have know- its proximity.

The COURT: I left that for the jury.

Mr. YOUNG: That is what I am objecting to.

The COURT: It shouldn't have gone to the jury?

Mr. YOUNG: It is a matter of law.

The COURT: I don't think the way you state it would be the subject of any exception. You want to except to what was said about the setting of the switch being notice?

Mr. YOUNG: About the setting of that switch being notice, yes, your Honor.

Mr. YOUNG: Now I want an exception to what the Court said about the plaintiff being entitled to compensation for the loss of the limb in addition to his reduced capacity of earning wages and in addition to pain and suffering and inconvenience, as I understood the charge.

The COURT: That wasn't the way it was put to the jury.

Mr. YOUNG: I mean on that subject, compensation for loss in addition to reduced capacity for earning wages and in addition to pain and suffering and inconvenience.

177 And forasmuch as the matters aforesaid do not appear of record, the foregoing exceptions are allowed and placed on file as a part hereof, on this 24th day of July, 1905, a day in said term.

HOYT H. WHEELER, *Judge.*

ST. JOHNSBURY, VT., *June* 12, 1905.

I hereby certify that the foregoing is a full and true transcript of testimony, objections, exceptions and charge, in the case of John N. Gokey *vs.* Boston & Maine Railroad, taken in United States Court before Judge Wheeler, at Newport, Vt., June 1, and 2nd, 1905.

Attest,

MARY J. NELSON, *Reporter.*

(Endorsed:) Filed September 6th, 1905.—Geo. E. Johnson, Clerk.

And afterwards, and on the 11th day of September, A. D. 1905, the defendant filed its assignment of errors in said cause; which said assignment of errors is in the words and figures following:

United States Circuit Court for the District of Vermont, May Term, 1905.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Defendant's Assignment of Errors.

Comes now the defendant in the above entitled cause and assigns the following errors in the decision and judgment of the Cir-
178 cuit Court in said cause, upon which it will rely in its prosecution of the writ of error in the above entitled cause.

1st. That the United States Circuit Court in and for said District

of Vermont, erred in overruling the motion to dismiss said cause interposed by the plaintiff-in-error, defendant in the original cause.

2nd. That said Court erred in overruling the first ground assigned for the dismissal of said cause in the motion to dismiss said cause interposed by the plaintiff-in-error, defendant in the original cause.

3rd. That said Court erred in overruling the second ground assigned for the dismissal of said cause in said motion to dismiss.

4th. That said Court erred in overruling the third ground assigned for the dismissal of said cause in said motion to dismiss.

5th. That said Court erred in overruling the fourth ground assigned for the dismissal of said cause in said motion to dismiss.

6th. That said Court erred in overruling the fifth ground assigned for the dismissal of said cause in said motion to dismiss.

7th. That said Court erred in overruling the sixth ground assigned for the dismissal of said cause in said motion to dismiss.

8th. That said Court erred in overruling the seventh ground assigned for the dismissal of said cause in said motion to dismiss.

179 9th. That said Court erred in overruling the eighth ground assigned for the dismissal of the said cause in said motion to dismiss.

10th. That said Court erred in overruling the ninth ground assigned for the dismissal of said cause in said motion to dismiss.

11th. That said Court erred in overruling the tenth ground assigned for the dismissal of said cause in said motion to dismiss.

12th. That said Court erred in overruling the eleventh ground assigned for the dismissal of said cause in said motion to dismiss.

13th. That said Court erred in overruling the twelfth ground assigned for the dismissal of said cause in said motion to dismiss.

14th. That said Court erred in overruling the thirteenth ground assigned for the dismissal of said cause in said motion to dismiss.

15th. That said Court erred in overruling the fourteenth ground assigned for the dismissal of said cause in said motion to dismiss.

16th. That said Court erred in overruling the demurrer interposed by the plaintiff-in-error, defendant in the original cause, to the replication filed by the defendant-in-error, plaintiff below, to the plea in abatement interposed by the defendant in the original cause, and in holding said plea in abatement bad and said replication sufficient for such a plea.

180 17th. That said Court erred in overruling the first ground of the demurrer interposed by the defendant, plaintiff-in-error, to the replication of the plaintiff, defendant-in-error, to the plea in abatement of the defendant, plaintiff-in-error, and by adjudging and deciding that said plea was bad and said replication was sufficient for such a plea.

18th. That said Court erred in overruling the second ground of said demurrer.

19th. That said Court erred in overruling the third ground of said demurrer.

20th. That said Court erred in overruling the fourth ground of said demurrer.

21st. That said Court erred in overruling the fifth ground of said demurrer.

22nd. That said Court erred in overruling the sixth ground in said demurrer.

23rd. That said Court erred in overruling the seventh ground in said demurrer.

24th. That said Court erred in overruling the eighth ground in said demurrer.

25th. That said Court erred in adjudging that it had jurisdiction of said action.

26th. That said Court erred in adjudging that it had acquired jurisdiction of the defendant in said action.

27th. That said Court erred in not dismissing said action, as prayed in defendant's said motion to dismiss.

181 28th. That said Court erred in adjudging said plea in abatement insufficient.

29th. That said Court erred in overruling and denying the motion made by counsel for plaintiff-in-error at the close of the testimony and before the charge to the jury, to order a verdict for the defendant upon the following grounds:

a. That no negligence on the part of the defendant, plaintiff-in-error, was shown either in the location, the height, or the construction of the switch-stand or switch target which plaintiff below claims contributed to his injury.

b. That on his own evidence the plaintiff was guilty of negligence which contributed to his injury.

c. That the whole evidence fails to show a cause of action.

d. That the whole evidence fails to establish in favor of the plaintiff below a right to recover.

e. That on the whole evidence the plaintiff below was not entitled to recover.

f. That the risk and danger, if any, resulting from the location and height of the switch-stand and target involved in this case, was a risk of the employment which plaintiff below assumed.

g. That plaintiff below knew or ought to have known the proximity of the switch-stand and target to the track.

h. That plaintiff below knew or ought to have known that
182 the switch-stand and target was so close to No. 1 track that he could not pass it on the side of a car, and knew or ought to have known the danger of attempting so to do.

30th. The said Court erred in overruling the objection of counsel for plaintiff-in-error to the following question asked of the plaintiff, and in receiving his answer thereto:

"Q. Now I ask you, Mr. Gokey, if you had received directions what to do in case you noticed a brake squealing? A. Well, we was to let the brake off."

31st. That said Court erred in overruling the objection of counsel for plaintiff-in-error to the following question asked of the plaintiff, and in receiving his answer thereto, subject to the exception of the plaintiff-in-error:

"Q. Now had you received any notice or warning from the rail-

road company as to the danger of this switch staff? A. No, sir."

32nd. That the said Court erred in overruling the objection of counsel for plaintiff-in-error to the following question relating to what the plaintiff thought just before the accident as to the danger or safety of the switch in question, and in permitting him to answer said question, subject to plaintiff-in-error's exception:

"Q. Now I want to have you tell whether you believed this switch to be so located as to be safe or dangerous? A. I believed it was safe."

33rd. That said Court erred in overruling the objection of counsel for plaintiff-in-error to the following question asked of the plaintiff, and receiving his answer thereto, with relation to
183 the switch-stand while it stood on the east side of the main line:

"Q. And how was it with reference to being at a safe distance? A. It was perfectly safe."

34th. That the Court erred in allowing testimony to go to the jury during the trial of said cause over the objection of defendant's counsel to the effect that the switch-stand operating the switch at the cornfield siding was at a safe distance from the track for one riding past it on the side of a car, before it was changed from the east to the west side of the main line.

35th. That said Court erred in overruling the objection of counsel for plaintiff-in-error to the following question asked of witness Swail:

"Q. If you say that is the position he was in, which way was his back with relation to the switch? A. His side would be towards the switch and back towards the main line."

36th. That the said Court erred in instructing the jury as follows:

"Now in view of the whole, all the circumstances, the question that is for you, is, was the switch target as it was placed there beside this track No. 1, between that and the main line, reasonably safe for the plaintiff and others to work about as they would be expected to? Reasonably? Take the whole thing into view, take the whole situation into view, the main track, track No. 1, the switch between, and where it was placed, closer to track No. 1 than to the
184 main line, within, somebody said, thirteen inches from that target to the grab iron, or whatever it is; they told the distances to the rails—they don't all agree about it. You will look right on the evidence, the testimony of all the witnesses, and see how near it was, and see whether you, as reasonable men, under all the circumstances would leave that yard in that way there to be used by trainmen, by the brakemen. Would you think it safe if you knew just how near it was, just how near the car it was, just how men would be riding along on a car or getting on when it was necessary? Supposing you knew all about that, all of these circumstances, and the convenience of placing it in any other place for the purpose of doing what was required to be done by it. Now, look at it as reasonable men, to be fair to the defendant and fair to the plaintiff .Do you think that was reasonably safe, a reasonably safe place to put a man to work at? Should you think it was if you

was a brakeman, calling yourself reasonable men, a reasonable man, as brakeman? Would you think it was safe if you knew all about it and knew what a brakeman would know or might not know about it? Look at it either way, both ways, from the standpoint of the railroad company and with their men in charge, and from the standpoint of the trainmen. Was that a safe thing to be put right there near the cars on which men would work, the frequency with which it would have to be used, the danger there would be from it? and say whether that was reasonable or not, reasonably safe on the whole, and if you think it was, return a verdict for the defendant."

185 37th. That the Court erred in instructing the jury as follows:

"But if you don't think it was, and think it was unreasonably dangerous, unreasonably careless, likely to harm somebody, so that you can say it was not a reasonable thing to have there in that place, ought not to have been put so near the track, or so high up, or both, take it just as it was—if you say that was unreasonable, then if that is what injured the plaintiff, if that is what caused the injury to him, then your verdict should be for the plaintiff."

38th. That the Court erred in instructing the jury, as follows: "then your verdict should be for the plaintiff, unless it appears to you that he brought this on himself by his own want of care and prudence by doing what he did do when the injury was caused, by causing the injury to himself instead of its being their fault, so that you can say it was his fault, either in whole or in a substantial part."

39th. That the Court erred in instructing the jury, as follows:

"Some of the witnesses say that he set the switch himself, that he actually set it. Would that warn him, just setting the switch, would a prudent man know from setting the switch as it was, whether it was too near the car to be safe to try to get onto a car when going past?"

40th. That the said Court erred in instructing the jury,

186 that the burden is on the defendant to show that he (the plaintiff) contributed to the injury.

41st. That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff-in-error.

"A railroad yard, where trains are made up, necessarily has a great number of tracks and switches close to one another and any one who enters the service of a railroad corporation, in any work connected with the making up or moving of trains, assumes the risk of that condition of things.

42nd. In refusing to give the following instruction:

"A master may conduct his business in a dangerous way, provided it be not unlawful, and does not interfere with the rights of others, without liability to his servant, who has sufficient capacity to comprehend the danger and voluntarily incurs it."

43rd. In refusing to give the following instruction:

"The defendant owes a duty to the public in the operation of its trains, greater than that to its employees. In determining whether

defendant was negligent in locating this switch as it did, you should consider all phases of the matter, the safety of trains as well as the safety of employees. You should not find the defendant guilty of negligence in erecting this switch-stand as and where it did unless you find, from the evidence, that some other kind of switch-stand or some other location of the switch-stand would have been
187 safer for employees and equally safe for the trains and that no new danger in the operation of the road would be introduced thereby."

44th. In refusing to give the following instructions:

"The plaintiff's evidence fails to show that any other switch-stand or any other location thereof, all things considered, would have been safer or better."

45th. In refusing to give the following instruction:

"The defendant is not to be regarded as negligent in erecting and maintaining contrivances or things for use in the operation of its road for the reason that they are dangerous to the persons operating the trains."

46th. In refusing to give the following instructions:

"Because there was danger in the location of this switch-stand it does not follow that the defendant was negligent in using the kind of switch-stand it did use or in locating it as it did."

47th. In refusing to give the following instruction:

"If this switch-stand was placed so near the No. 1 side track as to be dangerous to one riding past it on the side of a car, and plaintiff knew, or by the exercise of due care and diligen-e ought to have discovered that it was so placed, he assumed the risk resulting therefrom, and for the injury resulting from such location of said switch-stand, plaintiff cannot recover."

188 48th. In refusing to give the following instruction:

"Plaintiff was bound to use his senses, and he assumes such risks as are incident to the employment from causes that are open and obvious, the dangerous character of which he has had an opportunity to ascertain. This assumption embraces all such risks arising from his employment as he knew, or in the exercise of a reasonable degree of prudence, might have known to be incident to his employment."

49th. In refusing to give the following instruction:

"Plaintiff is bound to exercise the care and caution of an ordinarily prudent person, in the circumstances, to avoid injury. Any failure on his part to observe such care is contributory negligence on plaintiff's part and if it contributes in any degree to his injury, he cannot recover."

50th. In refusing to give the following instruction:

"Contributory negligence may consist of omissions as well as of affirmative acts."

51st. In refusing to give the following instructions:

"Plaintiff was bound to do all that a reasonably prudent person would do to prevent injury. If he had looked toward the switch-target at any time before he got onto the car or before the car reached the target, he could have seen it and have avoided being hit by it.

If his injury is due to any extent to his failure or omission
189 to look in the direction of the target and to see it, then his failure so to look and see is contributory negligence and bars his recovery, and your verdict should be for defendant."

52nd. In refusing to give the following instruction:

"The burden is on the plaintiff to establish every fact necessary to entitle him to recover by a fair balance of testimony."

53d. In refusing to give the following instruction:

"Under this rule he must satisfy you by a fair balance of testimony that defendant was negligent, and that its negligence was the proximate cause of his injury; that plaintiff had not assumed the risk of the switch-stand located where it was, and that he had not been guilty of any negligence on his part, either of omission or commission which in any way contributed to his injury."

54th. In refusing to give the following instruction:

"The evidence in the case fails to show facts sufficient to constitute a cause of action in favor of plaintiff and against defendant and your verdict should be for defendant."

55th. That said Court erred in failing to give the jury any instructions as to the assumption of risks by the defendant-in-error, plaintiff below.

56th. That said Court erred in entering judgment in said cause in favor of defendant-in-error and against plaintiff-in-error.

190 Wherefore, the said Boston & Maine Railroad, plaintiff-in-error, prays that the judgment of the Circuit Court of the United States for the District of Vermont be reversed and that the said Circuit Court be directed to grant a new trial of said cause.

YOUNG & YOUNG,
Attorneys for Plaintiff-in-Error, Defendant in the Lower Court.

(Endorsed:) Filed September 11th, 1905.—Geo. E. Johnson, Clerk.

And on the 12th day of September, A. D. 1905, the defendant filed its bond in error, duly approved by the Court; which said bond in error is in the words and figures following:

United States Circuit Court, District of Vermont, May Term, 1905.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Bond on Writ of Error.

Know all men by these presents, that we, Boston & Maine Railroad, as principal, and H. E. Folsom, of Lyndon, in the
191 County of Caledonia and State of Vermont, as surety, are held and firmly bound unto John N. Gokey, plaintiff above

named, in the sum of four thousand dollars, to be paid to the said John N. Gokey, his executors or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 25th day of September, A. D. 1905.

Whereas, the Boston & Maine Railroad, defendant above named, has sued out a writ of error to the United States Circuit Court of Appeals, for the Second Circuit, to reverse the judgment in the above entitled cause by the Circuit Court of the United States for the District of Vermont.

Now, therefore, the condition of this obligation is such that if the above named Boston & Maine Railroad shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BOSTON & MAINE RAILROAD,
By LUCIUS TUTTLE, [L. S.]
Its President.
H. E. FOLSOM. [L. S.]

Signed, sealed and delivered in presence of
E. G. RYDER.
GEO. B. YOUNG.

Approved Sept. 11, 1905.
HOYT H. WHEELER, *Judge.*

(Endosed:) Filed September 12th, 1905.—Geo. E. Johnson, Clerk.

192 And on the 11th day of September, A. D. 1905, a writ of error to the United States Circuit Court of Appeals for the Second Circuit, was duly issued in said cause, which was duly allowed by the Court and ordered to be filed, and was so filed on said 11th day of September, A. D. 1905.

And on the same 11th day of September, A. D. 1905, a citation was duly issued out of this Court, which was returned into Court, with service duly accepted in writing thereon on the 18th day of September, A. D. 1905; which said citation is hereto annexed.

And afterwards, and on the 5th day of October, A. D. 1905, an order was filed extending the time in which to file the record herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, thirty days from October 11th, A. D. 1905; which said order is in the words and figures following:

United States Circuit Court, District of Vermont.

JOHN N. GOKEY
vs.
BOSTON & MAINE RAILROAD.

Upon all the proceedings had and allowance of appeal herein by the Hon. Hoyt H. Wheeler, Judge, on the 11th day of September, 1905, and the citation being returnable October 11th, 1905, it is hereby, on request of the clerk and representation that more time is necessary;

193 Ordered, that the time to file the record herein with the Clerk of the United States Circuit Court of Appeals for the Second Circuit, be and it is hereby extended thirty days from October 11th, A. D. 1905.

Done in Court at Brattleboro, in said District, this 5th day of October, A. D. 1905.

HOYT H. WHEELER, *Judge.*

(Endorsed:) Filed October 5th, A. D. 1905.—Geo. E. Johnson, Clerk.

194 Clerk's Office U. S. Circuit Court, District of Vermont.

BURLINGTON, *September* 28, 1906.

I hereby certify, that the original writ in case of Boston & Maine Railroad, plaintiff in error, *vs.* John N. Gokey, defendant in error, recently pending in this Court, contains the seal of the United States Circuit Court, District of Vermont; and that in certifying the transcript of record of said cause to the United States Circuit Court of Appeals for the Second Circuit, it was inadvertently omitted; and that the original and printed records should be corrected, by adding said seal to the writ in the original transcript, and to the printed record on page fifteen thereof.

[SEAL.] GEO. E. JOHNSON, *Clerk.*

Endorsed: (Printed records corrected 9/29/06) B. & M. Ry. *vs.* Gokey. Certificate of Clerk. United States Circuit Court of Appeals Second Circuit. Filed Sep. 29, 1906. William Parkin, Clerk.

195 United States Circuit Court of Appeals for the Second Circuit.

No. 11, October Term, 1906.

Argued October 12, 1906; Decided December 4, 1906.

THE BOSTON & MAINE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOHN N. GOKEY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Vermont.

Before Judges Wallace, Townsend, and Coxe.

Error to the Circuit Court of the United States for the District of Vermont to review a judgment entered on the verdict of a jury in favor of the plaintiff for $3,350.

COXE, *Circuit Judge:*

The plaintiff, a brakeman in the employ of the defendant, was, while in the discharge of his duties, struck by the target of a switch and thrown to the ground from a moving freight car. He received injuries which resulted in the amputation of one of his feet three inches above the ankle.

The switch which caused the accident was located in the freight yard at Lyndonville, Vt., having been placed in position but a few weeks prior to the accident.

The dangerous proximity of the target to the track was unknown to the plaintiff as he testified that he had never operated it in its changed location or been warned regarding it. It was so near the track that while in the act of climbing up the ladder of the
196 moving car to release a brake, with his back to the switch, he was caught by the target and hurled to the ground. In other words, there was not room enough to permit the body of a brakeman in that position to pass in safety.

It cannot be successfully maintained that the danger from such a structure was one of the ordinary risks assumed by the plaintiff on entering the defendant's employ. The law imposed upon the defendant the duty of furnishing for the use of its servants fit and suitable means and appliances. The jury found that the defendant failed to perform this duty; they found, in effect, that the defendant furnished an unsafe switch with the target so located that it served as a trap in which employees, ignorant of its position, might be caught and killed or injured. Whether such a structure was one reasonably safe and proper to be maintained at the place described was a question of fact and was presented to the jury under instructions as favorable as the proofs warranted.

The same statement is true as to the alleged contributory negligence of the plaintiff. It cannot be said, as matter of law, that he

was at fault in not ascertaining the situation in time to avoid contact with the target. The peril was not so obvious as to justify the trial court in imputing negligence to the plaintiff in failing to discover it. In the absence of notice or knowledge to the contrary he had a right to assume that, when in the discharge of his duty he was required to mount a moving car, he would not be hurled to the ground by a target placed so near the car that his body could not pass in safety. At least it was a question for the jury.

The case is an exceedingly simple one upon the facts, involving questions which are constantly arising in negligence cases; these questions were properly sent to the jury under instructions which fairly presented the conflicting contentions of the parties and, after a careful examination of the record, we fail to find any error which warrants us in reversing the judgment.

We are unanimously of the opinion that the trial was fairly and impartially conducted and that the verdict, considering the irreparable injury to the plaintiff, was a moderate one.

We refrain from discussing the jurisdictional question argued at the bar and in the briefs, for the reason that this court since its organization has uniformly held that the act creating the
197 Circuit Courts of Appeal confers no authority upon these courts to pass upon questions challenging the jurisdiction of the Circuit Courts. Section 5 of the act provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, and Section 6 provides that the Circuit Courts of Appeal shall have jurisdiction in all cases except those provided for in Section 5. This court has no appellate jurisdiction except such as is conferred by statute and we have been unable to perceive how the statute can be logically construed to bestow upon us a right which is expressly conferred on the Supreme Court and is expressly withheld from us.

U. S. *v.* Lee Yen Tai (113 Fed. Rep. 465); Fisheries Co. *v.* Lennan (130 Fed Rep. 533); Penn. Lumberman's Ins. Co. *v.* Meyer (126 Fed Rep. 354); in the S. C. (197 U. S. 407); Sun Printing Ass'n *v.* Edwards (194 U. S. 377); U. S. *v.* Jahn (155 U. S. 109); Halpin *v.* Amerman (138 Fed. Rep. 548).

The judgment is affirmed with costs.

G. B. Young, for the Plaintiff in Error.
E. A. Cook and H. W. Hovey, for the Defendant in Error.

198 United States Circuit Court of Appeals for the Second Circuit.

No. 11, October Term, 1906.

Argued October 12, 1906; Decided December 4, 1906.

THE BOSTON & MAINE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOHN N. GOKEY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Vermont.

Before Judges Wallace, Townsend, and Coxe.

WALLACE, *Circuit Judge* (dissenting):

Error is assigned, among others, of the denial by the court below of the motion by the defendant to dismiss the action upon the ground that because the writ for the commencement of the action was not properly served on the defendant the court had no jurisdiction of the defendant.

The writ was dated April 25, 1904; was made returnable and notified the defendant to appear and answer at a term of the United States Circuit Court for the District of Vermont to be held on the 17th day of May, 1904; and was served by the marshal on the 2nd day of May, 1904, by attaching property designated as the property of the defendant by one Folsom, its agent and division superintendent within the said district, and leaving a true and attested copy of the writ in Folsom's hands at his office in said district.

Upon the return day mentioned in the writ, the writ together with the marshal's return was duly filed, and thereupon the de-
199 fendant appeared specially for the purpose of the motion to dismiss and for the filing of a plea in abatement. The motion to dismiss was based upon the face of the writ and the marshal's return of service. The plea in abatement alleged facts qualifying the statements contained in the return of the marshal, and in substance asserted that the attempted service upon Folsom was unwarranted by the provisions of the statutes of Vermont. After the court had denied the motion to dismiss and had decided in effect that the plea in abatement was bad, the defendant answered upon the merits.

The assignment of error which challenges the ruling of the court in refusing to dismiss the action presents the general question whether the court acquired jurisdiction of the person of the defendant. If the court did not by a valid service of an authorized process obtain jurisdiction, the judgment is subject to review on a writ of error taken directly to the Supreme Court. This proposition was considered and decided in Shepard *v.* Adams (168 U. S. 618), where the case was one in which the summons required the defendant to appear and answer in a Federal Court of the District of Colorado

within ten days from the time of service of the summons instead of thirty days as provided for the procedure of the state courts by the statutes of Colorado. Inasmuch as section 5 of the Act conferring jurisdiction upon this court provides that writs of error may be taken from the Circuit Courts direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, as well as in any case which involves the constitutionality of any law of the United States, or the validity or construction of any treaty, while section 6 provides that the Circuit Courts of Appeal established by the Act shall exercise appellate jurisdiction to review by writ of error final decisions in all cases other than those provided for in section 5, the question arises whether this court can properly undertake to decide whether there was jurisdiction in the court below. In United States *v.* Lee Yen Tai (113 Fed. Rep. 465) we held that this court was not authorized to decide the validity or construction of a treaty; and in Fisheries Co. *v.* Lennan (130 Fed. Rep. 533), following that judgment, we decided that an appeal presenting the question of the jurisdiction of the Circuit Court, as well as other questions relating to the merits of the controversy, did not
200 authorize this court to pass upon the jurisdiction of the court below. These two decisions were based upon our understanding of the decisions of the Supreme Court in United States *v.* Jahn (155 U. S. 109) and Carter *v.* Roberts (177 U. S. 496). Since these decisions, however, the Supreme Court has considered again the proper construction of sections 5 and 6 in American Sugar Refining Co. *v.* New Orleans (181 U. S. 277), and I think it is apparent from its opinion that we misinterpreted the meaning of its former decisions. I am now satisfied that unless we see fit to certify to the Supreme Court the question of jurisdiction, we have authority, and it is our duty, to entertain and decide it in all cases where the jurisdiction of the Circuit Court is invoked solely because of the diverse citizenship of the parties to the action.

In Amy *v.* Watertown (130 U. S. 301) it was pointed out that although prior to the passage of the Act of June 1, 1872, it was always in the power of the Federal Courts, by general rules, to adapt their practices to the exigencies and conditions of the times, since the passage of that act the practice, pleadings and forms and modes of proceeding must conform to the state law and to the practice of the state courts, except when Congress has legislated upon a particular subject and prescribed a rule. And the court also declared that "When a state statute prescribes a particular method of serving mesne process, that method must be followed; and this rule is especially exacting in reference to corporations."

The Act of June 1, 1872, now section 914 of the United States Revised Statutes, does not require a Circuit Court of the United States to observe a strict conformity in actions at common law to the practice and procedure existing at the time in such actions in the courts of the state within which the Circuit Court is held, but permits the Circuit Court to conform thereto "as near as may be." As was said in Ind. & St. L. R. R. Co. *v.* Horst (93 U. S. 291): "This indefiniteness may have been suggested for a purpose; it de-

volved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of
201 justice, in their tribunals." In Shepard *v.* Adams (*supra*) a summons issued by the United States District Court for the District of Colorado which required the defendant to appear within ten days from the time of service was held to sufficiently conform to the statutes of Colorado regulating the practice of the state courts although those statutes provided that the time within which a summons should require the defendant to appear was twenty days. This conclusion was reached because the summons by the Federal Court was issued pursuant to a rule of that court which was adopted when the existing statutes of the state prescribed that summonses should require the defendant to appear within ten days, but which rule was not changed to conform to a subsequent change in the statutes of Colorado. The court said: "We have a right to presume that the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question." It is apparent from the reasoning of the opinion that the summons would have been held invalid if it had not been issued in pursuance of a rule of the Federal Court which conformed substantially when it was adopted to the state statutes.

The statutes of Vermont in force at the time of the issuing of the present writ, and for many days before, contained the following provisions applicable to the service of writs in actions like the present.

"SECT. 1088. Every writ and process returnable before the supreme and county courts, except as otherwise provided, shall be served within twenty-one days from the date of issuing the same, including the day of service, and excluding the day of issuing, and shall contain the following direction to the officer, viz.: 'Fail not but service and return make within twenty-one days from date hereof.'"

"SECT. 1089. The party suing out such process shall cause the same to be entered and docketed in the county clerk's office on or before the expiration of said twenty-one days, or the process shall on motion abate."

"SECT. 1090. The defendant shall cause his appearance therein to be entered with the clerk on or before the expiration of forty-two days from the date of such writ."

202 The only rule of the Circuit Court of the District of Vermont which touches the case is rule 8 which was adopted prior to the enactment of these provisions and provides as follows: "All mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof according to the laws of the state, otherwise it shall be returnable to the next regular term thereafter."

There is nothing in the rule of the Circuit Court which impinges upon the statutory provisions, and these provisions require the writ to be served within twenty-one days from its date of issuing,

and allow the defendant twenty-one days at least after service in which to appear in the action. The present writ was not served or attempted to be served on the defendant until the 2nd day of May, 1904, or fifteen days previous to the time at which the defendant by the writ was notified to appear and answer. I cannot escape the conclusion that the motion to dismiss should have been granted.

If process is not served pursuant to the required statutory time the service is nugatory unless cured by a voluntary appearance or waiver of the defendant. It was upon that ground only that the court assumed appellate jurisdiction in Shepard *v.* Adams. The defendant in the present case was deprived of the full opportunity to prepare its defense which the statute was intended to afford, and though it may have had in fact sufficient time, it was entitled to assert its statutory right. The denial of that right was error.

There is respectable authority for the proposition that if a defendant appears in order to take advantage of a defective process or service, and his motion to dismiss the suit on that ground is overruled, he cannot then answer and proceed to trial without making a virtual waiver of his objections. But the weight of authority is to the contrary. "Where a special appearance is made in order to object to illegality in the service of process, or to urge any objection for which a special appearance is appropriate, such special appearance is not waived and converted into a general one by answering to the merits after the objections are erroneously overruled. It is only where the defendant pleads in the first instance to the merits, without any special appearance, that objections to personal jurisdiction are waived." 2 Encyclopedia of Pleading & Practice,
203 629. That this is the law of the Federal Courts sufficiently appears by reference to Harkness *v.* Hyde (98 U. S. 476) and Southern Pacific *v.* Denton (146 U. S. 202).

For these reasons I am of the opinion that the judgment should be reversed.

204 United States Circuit Court of Appeals, Second Circuit.

BOSTON & MAINE RAILROAD, Plaintiff in Error,
vs.
JOHN N. GOKEY, Defendant in Error.

Petition for Rehearing.

John Young and George B. Young, Attorneys for Plaintiff, Newport, Vermont.

[Stamped:] United States circuit court of appeals, second circuit. Filed Dec. 14, 1906. William Parkin, clerk.

205 United States Circuit Court of Appeals, Second Circuit.

BOSTON AND MAINE RAILROAD, Plaintiff in Error,
vs.
JOHN N. GOKEY, Defendant in Error.

Petition for Rehearing.

Having carefully examined the opinion of the majority of this Honorable Court and also the dissenting opinion of His Honor Judge Wallace in the above entitled cause, we think that, with propriety, we may ask the Court to consider whether this case be not one in which it will be proper to grant a rehearing to the plaintiff in error on the following grounds:

1. That the sole ground of jurisdiction in the United States courts alleged in the original writ returnable to the Circuit Court of the United States for the District of Vermont, is diverse citizenship of the parties.

206 2. That the question of jurisdiction involved in this case relates solely to the sufficiency of the original writ in form and substance, and to the sufficiency of the service of said writ.

3. That these two questions were assumed by the counsel for plaintiff in error to be clearly within the jurisdiction of the Circuit Court of Appeals to determine, as being inherent in every court, and final jurisdiction seems to be given the Circuit Court of Appeals in all cases where the jurisdiction of the United States Circuit Court rests solely upon diverse citizenship, as in this case. For this reason, the question of the jurisdiction of this Court to determine this question was not argued but was assumed by counsel for both plaintiff and defendant in error.

4. That this is a question of great and general importance:

(*a.*) In that it involves the form of writ returnable to the United States Circuit Court and the manner of service of such writs, as compared with the form and service used in the State wherein such United States Circuit Court is held.

(*b.*) In that it involves the question whether the United States Supreme Court or the United States Circuit Court of Appeals has jurisdiction to determine these questions.

5. That in this case the writ does not conform to any form of writ ever authorized by the law of the State of Vermont, in which State the District of Vermont is situate, nor to any writ ever in use in said State.

6. That in this case the service of said writ does not conform to any form or manner of service ever provided for in the statutes of Vermont for the service of writs against or upon a corporation.

207 7. That the plaintiff in error is in fact, and is alleged in the original writ returnable to said Circuit Court, to be a corporation.

8. That the said cause was determined on the fourth day of

December, 1906, by affirmance of the judgment of the Circuit Court in favor of defendant in error; two Judges holding that this Court had no jurisdiction to determine the sufficiency of the writ and service, the other Judge, in dissenting opinion, holding that it had.

9. Plaintiff in error respectfully submits that the determination of the questions presented in the brief of the plaintiff in error as appears by said original brief on pages nine to thirty-four inclusive, relating to the sufficiency and service of said writ, involved the jurisdiction of this Honorable Court to decide said questions, but that no authorities were cited and no argument was made with relation to the jurisdiction of this Honorable Court to determine said questions.

10. The plaintiff in error further respectfully submits that the questions raised by plaintiff in error, in the United States Circuit Court and in this Court, did not involve the *jurisdiction* of the United States Circuit Court as a Federal Court, in the sense that the term jurisdiction is used in the Judiciary Act of March 3, 1891; that they only involve the question whether the writ and service were such as to give that Court jurisdiction of the process and of the person of plaintiff in error.

Wherefore, upon the foregoing grounds this plaintiff in error and petitioner respectfully prays this Honorable Court to grant to it a rehearing of said cause upon the following questions:

1. Is the original writ returnable to the Circuit Court of the United States for the District of Vermont sufficient?

208 2. Is the service of said original writ returnable to said Circuit Court sufficient?

3. Has the United States Circuit Court of Appeals jurisdiction to determine the foregoing two questions?

And the plaintiff in error further prays that in the reargument of this case it may be heard upon the proposition that the questions raised by plaintiff in error in the United States Circuit Court do not involve the *jurisdiction* of the United States Circuit Court as a Federal court in the sense that the word jurisdiction is used in the Judiciary Act of March 3, 1891.

YOUNG & YOUNG,
Attorneys for Plaintiff in Error and Petitioner.

I, George B. Young, of counsel for the petitioner herein, do hereby certify that, in my judgment, the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

GEO. B. YOUNG.

209 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 14th day of December, one thousand nine hundred and six.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

BOSTON & MAINE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOHN N. GOKEY, Defendant in Error.

Error to the Circuit Court of the United States for the District of Vermont.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the District of Vermont, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.
W. K. T.

210 Endorsed: United States Circuit Court of Appeals, Second Circuit. B. & M. R. R. *vs.* J. N. Gokey. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed Dec. 17, 1906. William Parkin, Clerk.

211 United States Circuit Court of Appeals, Second Circuit.

BOSTON & MAINE R. R.
vs.
J. N. GOKEY.

Petition for rehearing denied.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Filed Dec. 30, 1906. William Parkin, Clerk.

212 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the Court Rooms in the Post Office Building, City of New York, on the 21st day of December, 1906.

Present: Hon. William J. Wallace, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

BOSTON & MAINE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOHN N. GOKEY, Defendant in Error.

A petition for a rehearing having been filed herein by counsel for the Plaintiff in Error,

Upon consideration thereof it is

Ordered that said petition be and hereby is denied.

W. J. W.
W. K. T.

Endorsed: United States Circuit Court of Appeals, Second Circuit. B. & M. Ry. Co. *vs.* J. N. Gokey. Order. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 21, 1906. William Parkin, Clerk.

213 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 212 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Boston & Maine R. R. Co. against John N. Gokey, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of February, in the year of our Lord One Thousand Nine Hundred and Seven, and of the Independence of the United States the One Hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

214 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Boston & Maine Railroad is plaintiff in error, and John N. Gokey is defendant in error which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the District of Vermont, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
215 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of February, in the year of our Lord one thousand nine hundred and seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

216 [Endorsed:] File No. 20,527. Supreme Court of the United States. No. 562, October Term, 1906. Boston & Maine Railroad *vs.* John N. Gokey. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 14 1907. William Parkin, Clerk.

[Endorsed:] File No. 20,527. Supreme Court U. S., October Term, 1907. Term No. 198. The Boston & Maine Railroad, petitioner, *vs.* John N. Gokey. Writ of certiorari & return. Filed Feb'y 28", 1907.

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SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1906.

BOSTON & MAINE RAILROAD *Petitioner,* vs. JOHN N. GOKEY, *Respondent.*	Petition for Writ of Certiorari or of Mandamus, to United States Circuit Court of Appeals for the Second Circuit.

To the Above Named Respondent:—

SIR:—

You will please take notice that on Monday, the 28th day of January, 1907, at the opening of court on that day, or as soon thereafter as counsel can be heard, we shall submit to this court a motion in this cause that a writ of certiorari or a writ of mandamus issue herein to the United States Circuit Court of Appeals for the Second Circuit, in accordance with the prayer of the petition, of which and of this motion and brief in support thereof, a copy is herewith furnished you.

Yours, etc.,

EDGAR J. RICH,
JOHN YOUNG and
GEORGE B. YOUNG,
Attorneys and Counsel for Petitioner.

Received a copy of the above notice, motion, petition and brief this 10 day of January, A. D. 1907.

Harland B. Howe
Counsel for John N. Gokey.

DISTRICT OF VERMONT, } I, L. D. Miles ; of
COUNTY OF ORLEANS, ss. } Newport, in the County of Orleans and District of Vermont, being first duly sworn, on oath depose and say, that on the 10 day of January, A. D. 1907, at St. Johnsbury, in the County of Caledonia in said District of Vermont, I delivered to Harland B. Howe, Attorney of Record for the defendant in error, in the case of Boston & Maine Railroad, plaintiff in error, against John N. Gokey, defendant in error, pending in the United States Circuit Court of Appeals for the Second Circuit, a true copy of the foregoing notice and the following motion, petition and brief in support of said petition.

L. D. Miles

Subscribed and sworn to before me, this 11 day of January, A. D. 1907, at Newport, Vt.

H. P. Cushman
Notary Public.

SUPREME COURT OF THE UNITED STATES.

BOSTON & MAINE RAILROAD, *Petitioner,* vs. JOHN N. GOKEY, *Respondent.*	October Term, A. D. 1906.

MOTION FOR WRIT OF CERTIORARI OR MANDAMUS TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Now comes the above named petitioner, by Edgar J. Rich, John Young and George B. Young, its attorneys and counsel, and upon a certified copy of the transcript of the record herein, and upon the petition sworn to the 9th day of January, 1907, moves that a writ of certiorari issue herein to the United States Circuit Court of Appeals for the second circuit, or that a writ of mandamus be awarded in accordance with the prayer of the petition heretofore filed in this cause.

Respectfully submitted,

EDGAR J. RICH,
JOHN YOUNG, and
GEORGE B. YOUNG,
Attorneys and Counsel for Petitioner.

THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

The Petition of the Boston & Maine Railroad for a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court, the case of the Boston & Maine Railroad,
Plaintiff in Error,
against
John N. Gokey,
Defendant in Error,

Or for a Writ of Mandamus directed to said United States Circuit Court of Appeals for the Second Circuit, requiring it to determine certain Questions arising in said Cause.

To the Supreme Court of the United States:

The said petitioner respectfully shows to this Court as follows:

1. That your petitioner was, at the time of the commencement of this suit, a corporation duly organized, created and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and had its principal executive offices in Boston, in the County of Suffolk and Commonwealth of Massachusetts, and was and is a citizen of said Commonwealth of Massachusetts, and the respondent, John N. Gokey, was and is a citizen and resident of the State of Vermont.

2. That for a long time before and on, to wit, the 2d day of November, 1901, and from thence to and including the 2d day of May, A. D. 1904, your petitioner was, and ever since

has been, operating as lessee, the Connecticut & Passumpsic Rivers Railroad in the State of Vermont, and as such lessee, employed and had in said State of Vermont, numerous station agents and depot masters.

3. That on, to wit, said 2d day of November, A. D. 1901, said John N. Gokey, the respondent, was, and for several years prior thereto had been, employed by your petitioner as a freight brakeman on said Connecticut & Passumpsic Rivers Railroad in said State of Vermont; that on said 2d day of November, 1901, in the railroad yard of your petitioner in Lyndonville in Vermont, said John N. Gokey met with an accident wherein and whereby he was knocked from the side of a freight car by a switch target and received injuries, to recover for which, he instituted an action against your petitioner in the United States Circuit Court within and for the District of Vermont on, to wit, the 25th day of April, 1904, as more fully and at large will appear by the transcript of record of said case in the United States Circuit Court of Appeals, a certified copy of which is hereto attached to and made a part hereof, and filed herewith pp. 5-15 inclusive.

4. That said writ was dated the 25th day of April, 1904, and was returnable to a term of the United States Circuit Court for said District of Vermont next to be holden at Windsor within and for said District, on the third Tuesday of May, which was the 17th day of May, 1904; and said writ was attempted to be served upon your petitioner on the 2d day of May, A. D. 1904, by Horace W. Bailey, United States Marshal, by a pretended attachment of its locomotive engines No. 650 and 651, and by giving a copy of said writ to one H. E. Folsom, one of "its accredited agents and a division superintendent within said District" (Tr. pp. 5-15).

5. That the term of said circuit court to which said writ was made returnable, convened on the 17th day of May, 1904, twenty-two days after the date of said writ; that on said day, your petitioner by its attorneys, entered a special appearance in said cause for the sole purpose of filling a motion to dismiss and a plea in abatement (Tr. p. 26), and filed a motion to dismiss said writ because of the insufficiency of said writ and of said service; which motion was determined by said court against

your petitioner, and said writ and service were adjudged sufficient on, to wit, the 8th day of June, 1904 (Tr. pp. 23-26, 29-31).

6. That on the 17th day of May, 1904, your petitioner by its attorneys filed a plea in abatement praying to abate said writ because of the insufficiency of said writ and service (Tr. p. 18-22); to which plea in abatement the plaintiff replied on the 31st day of May, 1904, (Tr. p. 27), and thereafter on the 5th day of July, 1904, your petitioner demurred to said replication (Tr. pp. 30-31); and thereafterwards on the 9th day of July, the United States Circuit Court, by Wheeler, Judge, overruled defendant's demurrer, and adjudged plaintiff's replication sufficient, thereby sustaining said writ and service (Tr. pp. 33-36).

7. That thereafterwards on, to wit, the first day of June, 1905, a day in the May term, 1905, of said United States Circuit Court for the District of Vermont, said cause came on for trial before the Hon. Hoyt H. Wheeler, Judge of the District Court of the United States within and for the District of Vermont, sitting in the Circuit Court, and a jury, which trial resulted in a verdict for the plaintiff for the sum of thirty-three hundred and fifty dollars damages (Tr. p. 39, 40); and thereafterwards on, to wit, the 5th day of September, A. D. 1905, judgment was entered on said verdict in said Court; and thereafterwards on the 6th day of September, 1905, your petitioner filed its bill of exceptions in said cause, which was duly allowed by said court on the 24th day of July, 1905 a day in said May term of said Court, and was ordered to be filed as a part of the record in said cause.

8. That thereafterwards on, to wit, the 11th day of September, 1905, a writ of error was duly allowed to the United States Circuit Court of Appeals for the second circuit, and said cause was duly entered in said United States Circuit Court of Appeals.

9. That such proceedings were thereupon had in the United States Circuit Court of Appeals, that said cause was argued by counsel for the parties before Judges Wallace, Townsend and Coxe, and thereafterwards on the 4th day of December, 1906, said Circuit Court of Appeals, by a divided court, affirmed

the judgment of said Circuit Court. The majority of said Circuit Court of Appeals, in an opinion written by Judge Coxe, held that said Circuit Court of Appeals was without jurisdiction or authority to decide the jurisdictional questions raised in that court and in the Circuit Court for the District of Vermont, on your petitioner's claims that said original writ returnable to said Circuit Court and the service thereof were insufficient and of no effect. Judge Wallace, in a dissenting opinion, held that said Circuit Court of Appeals had jurisdiction and authority and that of right it ought to decide said questions, and thereupon entered into a consideration of the merits of said questions raised by your petitioner, and held and determined that said writ was insufficient and that said cause should be reversed and said writ dismissed.

10. Concerning the power of the Circuit Court of Appeals to determine the questions relating to the sufficiency of said writ and service and the jurisdiction thereby acquired by the Circuit Court, Judge Coxe, in the opinion for the majority of the Court, says:

"We refrain from discussing the jurisdictional question argued at the bar and in the briefs, for the reason that this court, since its organization, has uniformly held that the Act creating the Circuit Court of Appeals confers no authority upon these courts to pass upon questions challenging the jurisdiction of the circuit courts."

Judge Wallace, in his dissenting opinion, says:

"The assignment of error which challenges the ruling of the court in refusing to dismiss the action, presents the general question whether the court acquired jurisdiction of the person of the defendant. * * * * The question arises whether this court can properly undertake to decide whether there was jurisdiction in the court below. In United States vs. Lee Yen Tai (113 Fed. Rep. 465) we held that this court was not authorized to decide the validity or construction of a treaty; and in Fisheries Co. vs. Lennan (130 Fed. Rep., 533) following that judgment, we decided that an appeal presenting the question of the jurisdiction of the circuit court, as well as other questions relating to the merits of the controversy did not authorize this court to pass upon the jurisdiction of the court

below. These two decisions were based upon our understanding of the decisions of the Supreme Court in United States vs. Jahn (155 U. S. 109) and Carter vs. Roberts (177 U. S. 496). Since these decisions, however, the Supreme Court has considered again the proper construction of Sections 5 and 6, in American Sugar Refining Company vs. New Orleans (181 U. S. 277), and I think it is apparent from its opinion that we misinterpreted the meaning of its former decisions. I am now satisfied that unless we see fit to certify to the Supreme Court the question of jurisdiction, we have authority, and it is our duty, to entertain and decide it in all cases where the jurisdiction of the circuit court is involved solely because of the diverse citizenship of the parties to the action."

Discussing the merits of the assignment, Judge Wallace further says:

"The statutes of Vermont in force at the time of the issuing of the present writ, and for many years before, contained the following provisions applicable to the service of writs in actions like the present.

'SECT. 1088. Every writ and process returnable before the supreme and county courts, except as otherwise provided, shall be served within twenty-one days from the date of issuing the same, including the day of service, and excluding the day of issuing, and shall contain the following direction to the officer, viz:—'Fail not but service and return make within twenty-one days from date hereof.''

'SECT. 1089. The party suing out such process shall cause the same to be entered and docketed in the county clerk's office on or before the expiration of said twenty-one days, or the process shall on motion abate.'

'SECT. 1090. The defendant shall cause his appearance therein to be entered with the clerk on or before the expiration of forty-two days from the date of such writ.'

The only rule of the Circuit Court of the District of Vermont which touches the case is rule 8 which was adopted prior to the enactment of these provisions and provides as follows: 'All mesne process shall be returnable at the next regular term, if there shall be time for seasonable service thereof

according to the laws of the State, otherwise it shall be returnable to the next regular term thereafter.'

There is nothing in the rule of the Circuit Court which impinges upon the statutory provisions, and these provisions require the writ to be served within twenty-one days from its date of issuing, and allow the defendant twenty-one days at least after service in which to appear in the action. The present writ was not served or attempted to be served on the defendant until the 2nd day of May, 1904, or fifteen days previous to the time at which the defendant by the writ was notified to appear and answer. I cannot escape the conclusion that the motion to dismiss should have been granted.

If process is not served pursuant to the required statutory time the service is nugatory unless cured by a voluntary appearance or waiver of the defendant. It was upon that ground only that the court assumed appellate jurisdiction in Shepard vs. Adams. The defendant in the present case was deprived of the full opportunity to prepare its defense which the statute was intended to afford, and though it may have had in fact sufficient time, it was entitled to assert its statutory right. The denial of that right was error."

11. That, subsequently to the filing of said opinions and on, to wit, the 14th day of December, 1906, your petitioner filed in said United States Circuit Court of Appeals for the second circuit, a petition for a re-hearing in said cause of Boston & Maine Railroad, Plaintiff in error, vs. John N. Gokey, Defendant in error, praying said court to grant a re-hearing of said cause upon the following questions:

(a) Is the original writ, returnable to the Circuit Court of the United States for the District of Vermont, sufficient?

(b) Is the service of said original writ, returnable to said Circuit Court, sufficient?

(c) Has the United States Circuit Court of Appeals jurisdiction to determine the foregoing two questions?

And further praying that in the re-argument of said cause, your petitioner might be heard upon the proposition that the questions raised by your petitioner in the United States Circuit Court did not involve the jurisdiction of the United States Circuit Court as a Federal court, in the sense that the

word jurisdiction is used in the Judiciary Act of March 3, 1891; which petition was on the 20th day of December, 1906, denied.

12. That the only rules in force in the Circuit Court of the United States for the District of Vermont relating to forms of process, are Rules 7 and 8 of said Court, which are as follows:

"Rule VII. The form of process and declaration shall be the same as is or may be, provided by the laws of this State, and in cases not properly provided for by such laws, in the form used in the County and Supreme Courts of the state so far as they may be applicable to the Federal courts."

"Rule VIII. All process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof, according to the laws of this state, otherwise it shall be returnable to the next regular term thereafter; final process shall be returnable to the next regular term, or otherwise, if so specially ordered by a judge."

13. That the form of a writ in Vermont is prescribed by statute and that the original writ in this cause, returnable to the Circuit Court for the District of Vermont, does not conform to the form or substance of writs now or at any time heretofore in use in the state courts in the state of Vermont or of any writ ever prescribed by the Statutes of Vermont, nor was the service of said writ sufficient under the statutes nor under the holdings of the state courts of the State of Vermont.

14. The questions and propositions of law involved in this case are substantially as follows:

(a) Is it necessary that the form of process and of service in the Circuit Court of the United States conform to the forms of process and service prescribed by statute of the state and in use in the courts of the state within which such United States Circuit Courts sit? Does the original writ in this cause returnable to the Circuit Court and the service thereof conform to the requirements of the Statutes of the United States and of the State of Vermont?

(b) Must all questions relating to the sufficiency of writs returnable to said Circuit Courts and relating to the sufficiency of the service thereof, be taken to the Supreme Court of the

United States for determination, or can such questions be determined by the respective United States Circuit Courts of Appeals?

(c) Where a question of jurisdiction such as is raised in this case is presented in conjunction with other questions in the case, does the Circuit Court of Appeals have authority and power to determine and decide such jurisdictional questions?

(d) In a case properly before the Circuit Court of Appeals, if a question affecting the jurisdiction of the United States Circuit Court is involved which does not challenge the jurisdiction of said Circuit Court as a Federal court, but simply raises the question whether said Circuit Court has acquired jurisdiction of the process and the parties to the suit by a sufficient process and by a sufficient service thereof, can said Circuit Courts of Appeals determine such jurisdictional questions, and should they do so?

15. That your petitioner raised and argued in the Circuit Court for the District of Vermont, and in the Circuit Court of Appeals, all questions relating to the sufficiency of said writ and to the sufficiency of the service thereof and on the petition for a re-argument, the power of said Circuit Courts of Appeals to determine such questions.

16. That there is a diversity of decisions and holdings by the different United States Circuit Courts of Appeals with relation to the foregoing questions. That the Circuit Courts of Appeals for the first, fifth, sixth, seventh and eighth circuits hold that such Courts have power and jurisdiction to determine questions affecting the jurisdiction of the Circuit co rts in their various circuits, and in many cases have determined such questions, when presented in connection with other questions.

King v. McLean Asylum ect., 64 Fed. Rep. 325. (C. C. A. 1st Circuit.)

Amer. Sugar Refining Co. v. Johnson, 60 Fed. Rep. 503. (C. C. A. 5th Circuit.)

Texas & P. R. R. Co. v. Bloom, 60 Fed., 979. (C. C. A. 5th Circuit.) Rep.

Baltimore & Ohio R. R. Co. v. Meyers, 62 Fed. Rep.

367. (C. C. A. 7th Circuit).

Rust v. United Waterworks Co., 70 Fed. Rep. 129. (C. C. A. 8th Circuit).

17. And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following reasons among others:

(a) Because there is a diversity of holdings among the United States Circuit Courts of Appeals for the different circuits, as to their power and authority to decide jurisdictional questions such as are raised in this case.

(b) Because it is of general and national importance that the jurisdiction of the Circuit Courts of Appeals to determine questions relating to the jurisdiction of the Circuit Courts be determined by the Court of last resort to the end that the decisions of said Courts on a vital question may be uniform and in accordance with the opinion of the Supreme Court.

(c) Because the questions presented are of sufficient general, national and material importance and interest to make it necessary that they should be determined by the Court of last resort.

(d) Because it is a matter of general and national importance to know whether the form of process and manner of service of process returnable to the United States Circuit Courts in the different circuits shall conform to the statutes and practice in those regards in the different states where said Courts are sitting.

(e) Because there is a conflict between the holding of the Circuit Court for the District of Vermont in this case, and the statutes and practice in the courts of the State of Vermont with relation to the form and service of process.

(f) Because on account of the large amount of litigation in the Federal Courts, it is of general, national and material importance and interest that it be determined by the Court of last resort what court has jurisdiction to determine questions as to the sufficiency of process, as to the sufficiency of service, and as to questions involving the jurisdiction of the United States Circuit Courts but not affecting their jurisdiction as Federal Courts.

18. That the holding of the Circuit Court of Appeals for the second circuit in this and previous cases, that said Court is without jurisdiction to determine any questions involving the jurisdiction of the Circuit Courts, whether said question is presented alone or in conjunction with other questions, places litigants in a dilemma in many instances. If this is the true construction of the Act of March 3, 1891, establishing the Circuit Courts of Appeals, then a defendant in such a case as this must elect to stand either on the jurisdictional question alone by a writ of error direct to this court from the Circuit Court, or to waive the jurisdictional questions and take his writ of error to the Circuit Court of Appeals on the merits.

Your petitioner respectfully suggests that such is not the true construction of the act creating circuit courts of appeals; that by taking a case directly to the circuit court of appeals, a litigant does not necessarily waive the jurisdictional question; that the act does not involve such a dilemma; that the power to certify the jurisdictional questions from the circuit court of appeals to this court, of necessity implies a power in the circuit courts of appeals to decide such questions, and that it is the intent and purpose of said Act that said circuit courts of appeals shall determine the question of jurisdiction of the circuit courts when that question, in conjunction with other questions in the case, is properly presented to the circuit courts of appeals; that the holdings of the Circuit Courts of Appeals in the first, fifth, sixth, seventh and eighth circuits are in accord with the true purpose and intent of the Act, and that the holdings of the Circuit Court of Appeals of the second circuit is contrary to said Act; that this diversity of holdings by the different courts, renders it important that the power of said courts with relation to such questions be determined by this Honorable Court.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the second circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

And if, for any reason, it shall seem improper to this Honorable Court to grant such writ of certiorari as herein prayed,

then your petitioner prays that this Honorable Court will be pleased to grant a rule addressed to the United States Circuit Court of Appeals for the second circuit and to the judges thereof, requiring it and them at some time, to be fixed by this Honorable Court, to show cause why a writ of mandamus should be awarded, commanding said court to determine the questions presented in this case:

First, as to the sufficiency of the original writ, returnable to the Circuit Court within and for the District of Vermont. and;

Second, the questions presented in this case as to the sufficiency of the service of said writ; and that upon failure to so show cause, said writ of mandamus may issue;

And for such other and further relief as, in the circumstances, to this Honorable Court may seem just.

BOSTON & MAINE RAILROAD,
By EDGAR J. RICH, JOHN YOUNG and GEO. B. YOUNG,
Its Attorneys and Counsel.

DISTRICT OF VERMONT, ss.

I, George B. Young, being duly sworn, say that I have been of counsel for the petitioner in the matter referred to in the foregoing petition; that I have read the foregoing petition; that the same is true to my own knowledge, information and belief. My knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the courts in which this action has been heard.

GEO. B. YOUNG.

Sworn to before me this
9th day of January, 1907.
Seal,
H. B. CUSHMAN, Notary Public.

I hereby certify that I have examined the foregoing petition and in my opinion, the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

GEO. B. YOUNG,
Of Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION.

The original suit of John N. Gokey vs. Boston & Maine Railroad, returnable to the United States Circuit Court for the District of Vermont, is an action of case for negligence, wherein the plaintiff seeks to recover for injuries sustained by him in the Lyndonville, Vermont, yard of the Railroad Company on the 2d day of November, 1901, by being knocked from the side of a stock rack car by a switch target, whereby one leg was so injured that it was necessary to amputate the leg at about the junction of the lower and middle thirds. The original writ, returnable to said Circuit Court, was dated April 25, 1904, (Tr. p. 15 f. 43.) was returnable to a term of said Court holden on the 17th day of May, 1904, (Tr. p. 5 f. 15) and was served May 2, 1904, (Tr. p. 15 f. 44.) said writ being dated twenty-two days, and being served only fifteen days before the term of court to which the same was made returnable.

On said 17th day of May, 1904, the Boston & Maine Railroad entered a special appearance in said cause for the purpose only of moving to dismiss said writ because it did not conform to the statutes of the United States nor of the State of Vermont, nor to the rules of court of said United States Circuit Court for the District of Vermont, nor to the forms of writs in use in the State Courts in the State of Vermont; and because the service thereof was not made in accordanec with the statutes of the United States nor of the State of Vermont, nor with the practice in the State of Vermont, and was not in accordance with any rule prescribed by said United States Circuit Court for the District of Vermont.

Said defendant thereupon filed a motion to dismiss, on said grounds (Tr. pp. 23-26) which was heard and overruled by the Court. Said defendant filed a plea in abatement, (Tr.

pp. 18-23) to which the plaintiff in said suit replied (Tr. p. 27) and to which replication the defendant demurred. (Tr. pp. 31 f. 93,—p. 33). Said demurrer was heard and overruled by said Court and the plea in abatement thereby held insufficient. (Tr. pp. 33 f. 99 et seq.) Thereupon, said cause went to trial and was tried in said Circuit Court before the Hon. Hoyt H. Wheeler, Judge, and a jury, and a verdict returned in favor of the plaintiff for thirty-three hundred and fifty dollars.

Exceptions were duly allowed and filed and a writ of error taken to the United States Circuit Court of Appeals for the second circuit. An assignment of errors was filed in said Court, wherein the Boston & Maine Railroad assigned and alleged error on the part of the Circuit Court in overruling its motion to dismiss and in adjudging its plea in abatement insufficient.

In said United States Circuit Court of Appeals both parties argued the questions relating to the sufficiency of said writ and service. No suggestion was made upon the argument of said cause by either the court or counsel for Mr. Gokey that said Circuit Court of Appeals was without jurisdiction to determine the questions relating to the sufficiency of said writ and service. After said Court announced its decision in said cause, affirming the judgment below and declining to consider the questions as to the jurisdiction of the United States Circuit Court because said Circuit Court of Appeals was without jurisdiction to determine such questions, your petitioner filed a petition for a re-hearing of said cause on the question of the jurisdiction of said Circuit Court of Appeals to determine the questions argued before it with relation to the sufficiency of said writ and service, which petition was denied.

ARGUMENT.

The petitioner respectfully submits:

A. That the original writ in said cause, returnable to the United States Circuit Court for the District of Vermont, was insufficient.

B. That the service of said writ was insufficient to give said court jurisdiction of said action or of the defendant therein.

C. That each of said questions was before the Circuit Court of Appeals for its determination and that said Court had jurisdiction to determine both of said questions.

D. That there is a diversity of holdings among the various United States Circuit Courts of Appeals with relation to their jurisdiction to determine questions affecting the jurisdiction of the Circuit Courts.

A. THE ORIGINAL WRIT IN SAID CAUSE, RETURNABLE TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF VERMONT, WAS INSUFFICIENT.

U. S. Revised Statutes, Section 911, provides:

"All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue and shall be signed by the clerk thereof."

Revised Statutes of the United States, Section 914, is as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Rule 7 of the United States Circuit Court for the District of Vermont is as follows:

"The form of process and declaration shall be the same as is or may be, provided by the laws of this State, and in cases not expressly provided for by such laws, in the form used in the County and Supreme Courts of the State so far as they may be applicable to the Federal Courts."

Rule 8 of the United States Circuit Court for the District of Vermont, promulgated at the May term, 1885, provides that:

"All process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof, according to the laws of this State, otherwise it shall be returnable to the next regular term thereafter; final process shall be returnable to the next regular term, or otherwise, if so specially ordered by a judge."

The Judiciary Act of the State of Vermont of March, 1797, provided among other things, that:

"Every writ or process issued against * * * a corporation, shall be served, at least thirty days before the session of the court, to which the same is made returnable."

The Revised Statutes of 1839, Chapter 28, Sec. 10; the General Statutes of 1863, Chapter 33, Sec. 18 and the Revised Laws of 1880, Sec. 868, contain the same provision; and such continued to be the law of the State of Vermont until December 1, 1893, when act No. 28 of the laws of 1892 took effect.

Vermont Statutes, Sec. 1088 (being Sec. 8 of No.28 of 1892), Sec. 1089 (being Sec. 9 of No. 28 of 1892) and Sec. 1090 (being Sec. 1 of No. 44 of 1894) were the statutory requirements in Vermont regarding service and return of writs and the appearance of defendants in a suit, in force at the time the writ in this cause was issued and served. These sections are as follows:

"SEC. 1088. Every writ and process returnable before the supreme or county courts, except as otherwise provided, shall be served within twenty-one days from the date of issuing the same, including the day of service, and excluding the day of issuing, and shall contain the following direction to the officer, viz.: 'Fail not but service and return make within twenty-one days from date hereof.' "

"SEC. 1089. The party suing out such process shall cause the same to be entered and docketed in the county clerk's office on or before the expiration of said twenty-one days, or the process shall on motion abate."

"SEC. 1090. The defendant shall cause his appearance therein to be entered with the clerk on or before the expiration of forty-two days from the date of such writ."

No. 137 of the Acts of the General Assembly of the state of Vermont, 1898, provides the form of a writ of attachment to be used in the courts of this state, as follows:

"STATE OF VERMONT. } To any sheriff or constable
COUNTY, ss. } in the state, or to
, an indifferent person,
GREETING:

By the authority of the state of Vermont, you are hereby commanded to attach the goods, chattels or estate of A. B., of....., in the county of....., to the value of.....dollars, and him notify thereof according to law; and also notify him to appear before the ..... county court, at..... within and for the county of ....., and also to notify .....to cause ..... appearance herein, to be entered with the clerk of said court, on or before the expiration of forty-two days from the date hereof, then and there in said court to answer to C. D., of ....., in the county of ....., in a plea of (here insert the declaration.) To the damage of the plaintiff..... dollars, for the recovery of which, with just costs, the plaintiff brings suit.

Fail not, but service and return make within twenty-one days from the date hereof.

Dated at ....., in the county of ....., the ..... day of .....,A. D.....

E. F., clerk (justice of the peace or master in chancery.)
G. H. recognized to the defendant in the sum of..... dollars, as surety for the costs of prosecution, as the law directs.
Before me, E. F., clerk, (Justice of the Peace or master in chancery.)"

The only provision of the statutes of Vermont which authorizes a foreign corporation to operate a railroad in Vermont, is Vermont Statutes, Sec. 3747, as follows;

"Railroad companies in this state may make contracts and arrangements with each other, and with railroad corporations incorporated under the laws of other of the United States, or under the authority of the Dominion of Canada, for leasing and running the roads of the respective corporations, or a part thereof, by either af their respective companies; and may contract for and hold in fee-simple or otherwise, lands or buildings in this or other states for depot purposes and storing freight; and may purchase and hold such personal property as is necessary and convenient for carrying into effect the object of this section."

The statutes relating to the service of process on non-resident lessees of railroads in Vermont, are Sections 3948 and 3949 Vermont Statutes, as follows:

"SEC. 3948. The trustees under an assignment, mortgage or other transfer, executed by a railroad company, and the lessees of a railroad company not resident in the state, who hold possession of the property of such railroad company, or manage the running of its road, under such assignment, mortgage, lease or other transfer, shall, if they reside without the state, appoint a person resident in the state, upon whom service of process may be made; and shall, in the month of January, annually, file in the office of the clerk of the county court in each county through which the road passes, a certificate signed by such trustees or lessees, designating the name and residence of the person thus appointed."

"SEC. 3949. Service of process upon such person shall be a legal service on such trustees or lessees, and if the trustees or lessees do not appoint such agent, and file such certificate, service may be made by leaving a copy of the process with a station agent, or depot master, in the employment of such trustees or lessees, and the same shall be legal service of such process upon such trustees or lessees."

The Vermont Statutes relating to service of process on corporations, is Sec. 1097, as follows:

"SEC. 1097. Writs against a corporation, except those in which the corporation is summoned as trustee, shall be served by leaving a copy with the clerk thereof, unless he is absent from the state; if there is no clerk, or if the clerk is absent from the state, the copy shall be left with one of the principal officers of the corporation, or, in the absence of all such officers, with one of the stockholders."

And the statutory provisions in Vermont relating to attachments are, Vermont Statutes, Sections 1104, 1109:

"SEC. 1104. The officer making attachment of personal property by lodging a copy in a town or county clerk's office, shall forthwith notify the defendant of the attachment, personally, or by leaving a written notice at his last and usual place of abode, or by leaving such notice with the person having the care of the property; and the officer shall state in his return the manner of giving such notice."

"SEC. 1109. When the goods or chattels of a person are attached at the suit of another, a copy of the attachment and list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, as directed in the service of summons, and if such person is not an inhabitant of the state, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached; and the delivery of such copy shall be certified by a sworn officer who served the attachment, or by the affidavit of a disinterested person who delivered the same."

We submit that the original writ is not in accordance with the provisions of Section 914 of the Revised Statutes of the United States. This statute provides that the form of the writ shall conform to the form of the writ in use in the state courts. Rule 7 of the United States Circuit Court for the District of Vermont is to the same effect and expressly provides that "the form of process and declaration shall be the same as is *or may be* provided by the laws of the state," etc. From the first of August, 1895, the statutes of Vermont have con-

tained provisions set forth in Sections 1088, 1089 and 1090 of Vermont Statutes (supra p. 19). The language of rule 7 of the Circuit Court (supra p. 18) is imperative and provides that "The form of process and declaration *shall be* the same as is *or may be* provided by the laws of this state."

We respectfully submit that this rule 7 requires the form of a writ returnable to the United States Circuit Court for the District of Vermont to conform to the law of the State of Vermont at the time the writ issues, else there is no force in the expression "or may be" in the sentence "shall be the same as *is or may be* provided by the laws of this state."

Therefore we respectfully submit that the writ in this case is not in conformity with the United States Statute above quoted, nor in conformity with rules 7 and 8 of the United States Circuit Court for the District of Vermont, nor in accordance with the statutes of Vermont in force at the time said writ issued.

Rule 8 of the United States Circuit Court for the District of Vermont (supra p. 18) provides that "All mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof according to the laws of this state, otherwise it shall be returnable to the next regular term thereafter."

Under the statute in force at the time this writ issued, "seasonable service" of said writ would mean at least twenty-one days prior to the first day of the term to which said writ was returnable, and it would mean, further, that the writ should have issued at least forty-two days before the opening day of the term, in order that there be "seasonable service" as that term is defined by the statutes of the state of Vermont.

There is no pretense that these statutory provisions were complied with in the present case. The writ was dated only twenty-two days before the term to which it was made returnable, instead of forty-two days, as the rule and the statute required. It was served only fifteen days before the term to which it was returnable (Tr. p. 15 f. 44).

The statutory form of writs returnable to the county courts of Vermont in similar actions provided that the defendant should appear within forty-two days from the date of the writ and not sooner, (supra p. 19) consequently, there was not time for "seasonable service" within the meaning of rule 8 and the Vermont Statutes to which that rule refers at the time this writ issued, so that said writ could be made returnable to the May term of said United States Circuit Court. Under the provisions of said rule 8, it should have been made returnable to the next regular term thereafter, viz:—the October term of said court, provided the latter part of the rule is to be given its plain meaning. It evidently was not the intent or purpose of the United States Circuit Court for the District of Vermont, when it promulgated this rule 8 to make the time of service of writs returnable to that court less than was then required or which might thereafter be required in the state courts. It was the evident intent of the rule to make the practice as to the time when writs should be returnable and the time of service conform to the state practice as it then was or might thereafter be.

An examination of the judiciary act of the State of Vermont, of March, 1797, (supra p. 18) and the subsequent statutes relating to the matter of writs and service against corporations, show that for nearly ninety-six years before this Rule 8 was promulgated in 1885, the statutes of Vermont required a writ against a corporation to be served at least thirty days before the term of court to which the same was made returnable. This rule certainly cannot be construed to require a shorter notice to corporations than that which the laws of the state required at the time it was promulgated, unless a shorter notice should thereafter be prescribed by the laws of the state.

The construction of this rule must, we respectfully submit, adopt one of two theories. It must either mean that the writ shall be so formulated as to conform to the law in force in the state at the time said rule was promulgated; or that the writ must be made to conform to the statutes of the state at the time the writ issues.

If the first is to be taken as the basis of construction, then this rule, in conjunction with the statutes of the United States

and of the State of Vermont, requires that said writ should be so formulated as to require the defendant in said suit to appear at some term of the United States Circuit Court for the District of Vermont, to be held not sooner than thirty days from the date when said writ would be served; that is, said writ must be so formulated that there will be ample time between the time it issues and thirty days before the term to which is it returnable, for proper service to be made upon the defendant.

If the second is the correct basis, then the writ should be dated at least forty-two days prior to the opening day of the term of said court to which it is made returnable, and said writ should provide for service thereof within twenty-one days from that date and for a return of the writ within that time to the United States Circuit Court.

Rule 8 does not prescribe any time for the return or service of a writ issued from the United States Circuit Court, otherwise than by reference to the state law then in force. Consequently the writ should have been formulated and served on one or the other of the plans above suggested. There is no pretence that it did conform to either. We therefore submit that said writ was not in accordance with the statutes of the State of Vermont, the rules of the Circuit Court nor the Statutes of the United States .

It cannot be assumed that under this rule the length of time that each writ must be served before the term of court to which it is returnable, and consequently the form of said writ, in so far as it directs when and how it be served and returned was intended to rest in the discretion of the judge of such court to be exercised in each case after the writ was served and entered in court.

There never was a statute in Vermont, under which this writ could be sustained if the writ had been returnable to a state court in Vermont.

The writ in this suit is in part as follows:

"By the authority of the United States, you are hereby commanded to attach the goods, chattels or estate of the Boston & Maine Railroad, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts * * * * to the value of fifteen thousand dollars, and it notify thereof according to law, and also notify it to appear before the Circuit Court of the Second Circuit of the United States, next to be holden at Windsor, within and for the said District, on the third Tuesday of May next, then and there to answer unto John N. Gokey, (Tr. p. 5) * * *

And have you there this writ with your doings herein.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Burlington, in the District of Vermont, this 25th day of April, in the year of our Lord one thousand nine hundred and four, and of the Independence of the United States the one hundred and twenty-eighth.

GEO. E. JOHNSON, clerk."

(Tr. p. 15, f. 43.)

It is to be noted that this writ requires the defendant to appear at a term of court to be holden on the third Tuesday in May, 1904, which was the 17th day of May, twenty-two days from the date of said writ.

No form of writ has ever been in use in the state courts of Vermont which required a defendant corporation to enter an appearance in a suit twenty-two days from the date of the writ. These matters were all apparent upon an inspection of the record, and consequently were properly raised by a motion to dismiss.

B. THE SERVICE OF SAID WRIT WAS INSUFFICIENT TO GIVE SAID COURT JURISDICTION OF SAID ACTION OR OF THE DEFENDANT THEREIN.

The statutes relating to the service of process in force in the State of Vermont at the time this writ issued and was served, are set forth at large (supra p. 19).

The only service attempted to be made of this writ is that shown by the officer's return which is as follows:

"UNITED STATES OF AMERICA, } ss.
DISTRICT OF VERMONT: }

"At Lyndon, in said District, on this the second day of May A. D. 1904, I made service of this writ by attaching as the property of the within defendant The Boston & Maine Railroad Company its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. &. M. R. R. Co. by H. E. Folsom, one of its accredited agents, and a division superintendent within said District. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and superintendent aforesaid, at his office at Lyndonville, in said District, with my doings thereon endorsed.

Attest: HORACE W. BAILEY, United States Marshal."
(Tr. p. 15 f. 44.)

The United States Revised Statutes, Sec. 914, and Rules 7 and 8 of the Circuit Court, provide that the practice, pleadings and forms and modes of proceeding in civil causes, shall conform to the state practice in these regards (supra p. 17 18).

Under these statutes and rules, the mode of making service and of acquiring jurisdiction of the defendant is governed by the state law.

Amey et al vs. Watertown, 130 U. S. 301; 32 L. Ed. 946.

Harkness vs. Hyde, 98 U. S. 476; 25 L. Ed. 237.

Mexican Central Ry. vs. Pinkney, 149 U. S. 194; 37 L. Ed. 699.

Connecticut Mutual Life Ins. Co. vs. Spratley, 172 U. S. 602; 43 L. Ed. 569.

It appears by the description of the petitioner, defendant in the original writ, that the Boston & Maine Railroad is a corporation created, organized and existing under and by virtue of the laws of Massachusetts (Tr. p. 5 f. 14). It further appears in the declaration that said Boston & Maine Railroad "before and at the time of committing the grievances hereinafter mentioned, operated and maintained a certain railroad and the appurtenances thereto belonging, to wit, at Lyndon, in the County of Caledonia, and District of Vermont" (Tr. p. 5 f. 15; 7 f. 20; 9 f. 25; 11 f. 31; 13 f. 38).

There is no statute in Vermont, except V. S. Sec. 3747 (supra p. 20) authorizing a foreign corporation to operate a railroad in this state.

We respectfully submit and insist that the Boston & Maine Railroad, at the time of the accident involved in this suit, as appears by the original writ and declaration, especially when this is construed in connection with Vermont Statutes Sec. 3747, was, and still is, a non-resident lessee of the railroad which it was then operating and maintaining in Vermont.

Therefore, the only mode of service of the writ upon the Boston & Maine Railroad is one of the methods prescribed by the Vermont Statutes, Sec. 3949 (supra p. 20); in other words, the provisions in Sections 3948 and 3949 for the service of process upon the lessee of a railroad not resident in the State of Vermont, is *exclusive*; and the fact that the lessee has "one of its offices for the transaction of its business" in Vermont, does not in any way change or enlarge the manner in which a writ may be served upon a defendant corporation which is such non-resident lessee. We submit that the service attempted in this case by leaving a copy with "H. E. Folsom, agent and superintendent," is void.

To acquire jurisdiction of a non-resident, it is necessary; first, to acquire a lien on property of the defendant; and, second, that proper notice of the suit be given such defendant.

In this cause, no valid attachment was made under the laws of Vermont, no lien on the engines mentioned in the writ was acquired and no valid service of the writ was made on the plaintiff in error under the laws of Vermont.

The requirements of the Vermont Statutes relating to attachments and to the service of process on corporations, are Sections, 1104, 1109 and 1097 (supra p. 21).

Unless this writ was served in accordance with the laws of Vermont, the motion to dismiss should have been granted, provided the failure to follow the state law was apparent on the face of the record. We submit that it was.

The statutes of Vermont require that the officer making an attachment of personal property shall forthwith notify the defendant by leaving a written notice with him or with the person having the care of the property; and the officer shall state in his return the manner of giving such notice, and shall also deliver to the party whose goods or chattels are so attached, a list of the property so attached, or if such person is a non-resident, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached and the delivery certified by the officer who served the attachment.

In the case of a corporation, a non-resident lessee of a railroad, the service of the notice and the list of property must be served on a person on whom service of process is authorized by the corporation to be made, or on "a station agent or depot master."

The officer's return is the evidence of the service and plaintiff is bound by that return. If the return shows that the officer gave the notice and list of property to a person acting in a certain capacity, and the service shown by the return is bad, it cannot be sustained by assuming or showing that such person on whom service was made held some other relation to the corporation, a non-resident lessee, not shown by the return, such that, had the service been made on him in that capacity, the service would have been good.

The method of service of the writ, of the notice, and of the list of property attached, and the persons on whom such service may be made, is provided by statute. That statute must be followed or the service is void.

The return in this case shows that the writ was served "by attaching as the property of the defendant, two locomotive engines numbered 650 and 651 the same being designated to me (the officer) as the property of the B. & M. R. R. Co. by H. E. Folsom, one of its accredited agents and a division

superintendent within said District. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and superintendent aforesaid at his office at Lyndonville, in said District, with my doings thereon endorsed.

Attest: Horace W. Bailey, United States Marshal."

Any other person could have pointed out these engines as the property of the Boston & Maine Railroad as well as Mr. Folsom. They were each labelled.

It does not appear that the engines were in Folsom's care. The fact that he pointed them out to the officer does not show this, nor raise any presumption of the fact.

It does not appear that the engines were in his office, and, if he was superintendent, it is not a violent presumption to suppose they were not.

If the Boston & Maine Railroad was the lessee of a railroad in Vermont and had appointed an agent upon whom service could be made under the statute, then that agent was the only person on whom to serve the writ in this action. It does not appear that such agent was not duly appointed by the Boston & Maine Railroad. It does not appear that Folsom was such agent. Service was not made on him as such agent.

If the Boston & Maine Railroad had designated no one on whom service could be made as provided by the statute, then a "station agent, or depot master" was the only proper person on whom to serve the writ. It does not appear that Folsom was either, and service was not made on him as such. It does not appear that the Boston & Maine Railroad had no "station agent, or depot master" in Vermont.

If the Boston & Maine Railroad had not appointed an agent on whom service could be made, and had no "station agent, or depot master" in this state, and if there was any person in whose care the property attached, was, when attached, then, possibly, service of the notice of the attachment, list of the property attached and of the writ could have been made on such last mentioned person, if the statutory requirements for such service had been followed, but they were not.

Neither of these conditions appear. It does not appear that Folsom was in possession of said engines, or was the "known agent and attorney of" defendant.

It does not appear by the return that the officer who served the attachment left a copy of the attachment and list of the articles attached with Folsom or any other person for the defendant, nor that any copy of the writ was left for the defendant.

It does not appear on the face of the return that the Boston & Maine Railroad had not appointed an agent upon whom service could be made. It does not appear by the return that it did not have "station agents, or depot masters" in this state.

There are no facts stated in the return which raise a presumption that Folsom was the "known agent or attorney" of defendant, *about the custody of the property attempted to be attached.* We submit that it is not every agent of a non-resident with whom a copy of the attachment and service of the list of articles attached can be left, but only the agent who has to do with the property as custodian or care-taker thereof. We also submit that "one of its accredited agents and a division superintendent" is not a "known agent and attorney" within the meaning of this statute.

We submit that the return fails to show a valid attachment of the property.

The delivery of the notice and list of property attached and the return are all essential to the validity of an attachment.

Clark and Freeman vs. Patterson, 58 Vt. 676.

In this case the Court say:

"An attachment is not complete and perfect until the officer's return is made. An officer may sieze and hold personal property until the return day, but unless he make a proper statement of it in writing on the writ and complete the service as required by statute, it cannot be deemed an attachment."

"An attachment of property is a method prescribed by statute for creating a lien upon the debtor's property, without his consent, to respond to the exigency of the writ and to satisfy the judgment that may be obtained against him. To con-

stitute a valid lien upon property by an attachment all the requirements of the statute in making it must be strictly followed. It is a general principle that any failure to comply with what is enacted as necessary to be done by the officer in making an attachment, must be held to he fatal to any lien attempted to be acquired thereby. Sumner vs. Sherman, 13 Vt. 609. The same principle applies in a proceeding for acquiring a lien upon property by virtue of a statute without the consent of the owner, as governs in a proceeding for acquiring title to the property under the provision of a statute without the consent of the owner."

"SEC. 881. R. L. (V. S. 1109) requires that 'a copy of the attachment and list of articles attached, attested by the officer serving the same, shall be delivered to the party whose goods and chattels are so attached,' etc."

"The official attestation of the attachment and list of articles attached, and the official certification in the officer's return on the writ, are essential parts of the service to make a valid attachment. Without this the service is essentially defective. Swetland v. Stevens, 6 Vt. 577"

If the court below acquired jurisdiction in this case it is because the attachment attempted to be made was a valid attachment and the service of the writ was made in accordance with the statutory provisions governing the same; and the validity of both must appear upon the return.

The court below had no discretion in determining this question by which they could adjudge that the service was sufficient at common law, or equitably, or morally but the question must be determined upon the face of the return, and tested by the Vermont Statutes, which the United States Courts are bound to follow.

Amy et al. vs. Watertown, 130 U. S. 301; 32 L. Ed. 946.

In this case the Court say:—

"The principal question in this case is, whether the defendant, the city of Watertown, was served with process in the suit so as to give the court below jurisdiction over it. In order to understand the bearing of the facts of the case, it will be necessary to give a brief abstract of the laws of Wisconsin which relate to it, and these are mostly to be found in the charter

of the city of Watertown and the Acts supplementary thereto. The state laws are referred to *because they govern the practice of the federal courts in the matter under consideration*" (Italics are ours.)

He then quotes Section 914, R. S. U. S., and continues:—

"Were it not for this statute, the circuit courts themselves could prescribe, by general rule, the mode of serving process on corporations as well as on other persons."

The opinion then cites various provisions of the local law which provides that a writ against the City of Watertown should be served upon the mayor.

Further in the opinion the Court say:—

"The service upon Rohr, the last mayor, therefore, was of no force, and had no effect whatever. The same thing may be said of the service on Baxter, the last presiding officer of the board of street commissioners."

"The question, then, is reduced to this: whether, in case the mayor has resigned and there is no presiding officer of the board of street commissioners (a body which seems to take the place of the common council of the city for many purposes), service of process on the city clerk and on a conspicuous member of the board is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail there would be no difficulty. In the absence of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. But when a statute intervenes and displaces the common law, we are brought to a question of words and are bound to take the words of the statute as law. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations."

Later the opinion quotes from a Wisconsin case:—

"When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est.* There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. When the statute designates a particular officer to whom the process may be delivered and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The

designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute."

"It is unnecessary to look farther to see what the law of Wisconsin is on this subject. It is perfectly clear that by that law the service of process in the present case was ineffective and void."

And the opinion concludes thus:—

"Here we are bound by statute, and not by the state statute alone, but by the Act of Congress, which obliges us to follow the state statute and state practice. The federal courts are bound hand and foot, and are compelled and obliged by the Federal Legislature to obey the state law; and according to this law the judgment of the circuit court was correct and is therefore affirmed."

In the case of the Connecticut Mutual Life Ins. Co. vs. Spratley, 172 U. S. 602; 43 L. Ed. 569, the United States Supreme Court discuss the question of service of process on a foreign corporation. In that case they held that the service which was there shown was sufficient, but in the course of the discussion make many suggestions corroborating our position in this case, that where the state statute prescribes a method of service which gives a reasonable opportunity to acquire jurisdiction of the non-resident corporation, the provisions of that statute must be strictly followed. On page 610 the Court say:—

"In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the State. (Citing cases.) And if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation."

Again on page 619:—

"If by the statute of the state provision were made for the

appointment of an agent by the company, upon whom process might be served, and the company had appointed such an agent and there was no other statute authorizing service of process upon an agent of the company other than the one so appointed, we do not say that service upon any other agent of the company would be good."

In another case before the United States Supreme Court the question of service upon the Mexican Central Railroad under the statutes of Texas was involved. This statute provided for service on various officers and agents of foreign corporations and, among others, "upon any local agent within this state." It was held that one is not a local agent of a railroad company within the meaning of the Texas statute relating to service of process on foreign corporations, simply because the company paid one-half of the expense incurred in the maintainance and operation of the joint warehouse in which he was employed. On page 209 the Court say:—

"In Harkness vs. Hyde, 98 U. S. 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits. * * * In the present case when it was established by the facts stated in the plea in abatement, and admitted by the demurrer thereto that the plaintiff in error was never brought before the court by any proper or legal process, the circuit court was without jurisdiction to proceed in the case; and in so doing, and in assuming jurisdiction and proceeding to trial on the merits, its action was erroneous."

Mexican Central R. R. Co. Ltd., vs. Pinkney, 149 U. S. 194; 37 L. Ed. 699.

In an action in Massachusetts against a railroad corporation established in the state of Michigan, the only service of the writ was upon the treasurer of the corporation at their office in Boston, Mass. There was no attachment of property. The return alleged that the corporation had its usual place of business within the commonwealth. The Court say:—

"We are aware of no authority for the maintenance of such an action; and none has been found by the diligence of the learned counsel for the plaintiff. On the contrary, the numerous cases cited for the defendant fully support the opposite conclusion. A foreign corporation can only be sued in this commonwealth by means of an attachment of its property; unless, as in the case of foreign insurance companies, by virtue of an express statute provision. The motion to dismiss was rightly allowed."

Andrews vs. M. C. R. Co. 99 Mass. 534.

To the same effect are

Desper et al. vs. Continental Water Meter Co., 137 Mass. 252.

Lewis vs. Northern Railroad, 139 Mass. 294.

In the case at bar service was not made on any agent or officer of the company on whom service was authorized by statute. The statutory provisions for service on a foreign corporation are ample. The return shows no reason why service was not made on some of the agents of the corporation on whom the statute authorized service. There is no presumption that such agents did not exist, as it affirmatively appears that the corporation was doing business and operating a rail road in Vermont.

We submit that the attempted service was void; that the Circuit Court acquired no jurisdiction; that the motion to dismiss should have been granted, and that the Circuit Court erred in denying the motion.

All subsequent proceedings in the case were error.

The United States Circuit Court is a court of limited jurisdiction, and no presumption can be made to give it jurisdiction. Its jurisdiction must appear on the face of the record.

Bors vs. Preston, 111 U. S. 252; 28 L. Ed. 419.

Circuit Court rule 8 (supra p. 18) is the only rule of the Circuit Court relating to the subject of service of process. This does not prescribe any time for service otherwise than by reference to the state law. The legal effect of this rule must be to require service of writs against corporations to be made

thirty days before the court to which they are returnable. The rule contains the provision "if there shall be time for seasonable service thereof according to the laws of this state."

From the organization of the state to the first day of December, 1893, the statute law of Vermont provided that a writ against a corporation should be served at least thirty days before the term of court to which it was made returnable. For nearly ninety years before rule 8 was promulgated, this was the law of Vermont relating to service of process against corporations.

The construction of rule 8 most favorable to the plaintiff is that a writ against a corporation must be served in accordance with the statute of Vermont in force when rule 8 was promulgated; that is, it must be served at least thirty days before the term to which the writ is returnable.

There is no pretense that the statutory provisions were complied with in the present case. The writ was not served as required by rule 8 and the Vermont Statutes in force when said rule 8 was promulgated; nor in accordance with Vermont Statutes, Sections 1088, 1089 and 1090 (supra p. 19) in force at the time the writ issued.

It cannot be assumed that under rule 8, the length of time that each writ must be served before the term of court to which it is returnable was intended to rest in the discretion of the judge of said court, to be exercised after the writ was served and entered in court.

The writ in this case was dated April 25, 1904, was returnable May 17, 1904, and was served May 2, 1904, only fifteen days before the term of court to which it was made returnable. This service was not in accordance with the statutes of Vermont in force when the rule was promulgated, nor when the writ issued. There never was a statute in Vermont, under which this service could be sustained if the writ had been returnable to a state court in Vermont.

The only service that was attempted to be made is that shown by the return (Tr. p. 15 f. 44); no other or different service is claimed to have been made or attempted to have been made.

If defendant was a Vermont corporation, service could have been made on the clerk or on a principal officer or on a stock holder. It does not appear that Folsom was either.

The service was not attempted to be made on him in any of those capacities, and the writ shows that defendant is not a Vermont corporation.

The service must stand on the return. No presumptions will be made for the purpose of helping out the service and sustaining jurisdiction.

Alexandria vs. Fairfax, 95 U. S. 774; 24 L. Ed. 583.

The Circuit Court had no jurisdiction of this action, except on the ground of the diversity of citizenship of the parties. In addition to the averments of the writ conferring jurisdiction, proper service on defendant is necessary. For the reasons hereinbefore stated, we submit that no service has been made on the petitioner sufficient to give the Circuit Court jurisdiction of the defendant in that court; therefore, the motion to dismiss should have been granted by the Circuit Court, and that Court's refusal so to do was error.

Mexican Central Ry, Co., Ltd. vs. Pinkney, 149 U. S. 194; 37 L. Ed. 699.

The defendant plead in abatement that the Boston & Maine Railroad was a corporation organized under the laws of the Commonwealth of Massachusetts and a resident of Massachusetts; that as lessee and not otherwise it operated the Connecticut & Passumpsic Rivers Railroad in Vermont; that it had twenty-five station agents and depot masters in Vermont at the time the said writ was attempted to be served; that it had no person residing in Vermont on whom it had authorized service of process issued against it to be made under the provisions of Vermont Statutes 3948-3949; that no service of said writ was made except as shown by the return; that H. E. Folsom, on whom service was attempted to be made, was not a person residing in Vermont on whom defendant had authorized service of process issued against it to be made; that he was not

a "station agent" nor "depot master;" that defendant had not accepted service of said writ; that no copy of said writ, no notice of said attachment, no list of the articles attached, attested by the officer serving said writ, was ever delivered to the defendant, nor to any person residing in the state of Vermont, appointed by defendant as a person upon whom service of process against this defendant might be made, nor to any "station agent" nor to any "depot master" in the employment of this defendant. (Tr. pp. 18-22.)

To this plea defendant in error replied that "H. E. Folsom on the day of the service of the original writ in this case, to wit, on the 2nd day of May, 1904, was a person residing within the state of Vermont on whom service of process issued against this defendant might be legally made, to wit, an agent of this defendant." (Tr. p. 27.)

To this replication defendant demurred specially, assigning as grounds of demurrer, that said replication traversed no averments of the plea, confessed and avoided none, averred only a legal conclusion, stated no material traversable facts, was not responsive to the plea, and averred no facts showing that H. E. Folsom was an agent on whom process issued against defendant could or might be legally served. (Tr. pp. 31-33 f. 93-97.)

The officer's return does not state that Folsom was an agent in charge of the locomotives attached, nor that the copy of the writ was given him as the custodian or caretaker thereof. The replication does not aver that he was such an agent. Under Vermont Statutes service can not be made on every agent of a non-resident corporation. It was not necessary in the plea to deny that Folsom was not the person having the care of the locomotives because there was nothing in the return to suggest that he was. We submit that the plea was good and sufficient to meet every issue raised by the return.

The replication denies none of the averments in the plea. It confesses and avoids none. It avers no facts showing that Folsom was an agent on whom service might legally be made, but avers the mere legal conclusion that he was an agent of defendant on whom process issued against defendant might be served. Unless he was a station agent or depot master

or a person residing in Vermont appointed by the defendant for that purpose under the provisions of Vermont Statutes, Section 3948 and 3949 (supra p. 20) he was not an agent on whom service could legally be made, of process issued against defendant, and his agency for any other purpose was wholly immaterial to any issue in this case.

Where the statute prescribes a certain manner of making service on a certain class of defendants, as is provided by Vermont Statutes, Sections 3948 and 3949, that method is exclusive. There is nothing in the Vermont Statutes which shows any intent on the part of the Legislature to make the service provided by said sections additional or cumulative. This statute was intended to facilitate service on non-residents operating railroads in Vermont, by making the number of agents upon whom service can be made, large, and the method of service certain; but it was made the exclusive and not additional or cumulative method of service and excludes service on other agents than those named in said sections.

Alexandria vs. Fairfax, 95 U. S. 774; 24 L. Ed. 583.

In this case the question was whether the service on the city of Alexandria, Va., was sufficient. In the opinion the Court say:—

"We are relieved from any difficulty on this subject by the state statute of Virginia, which prescribes, as all state laws should do, under which corporations are organized, the mode of serving process or notice on those corporations. This statute points out the officers of the corporation on whom such process or notice may be served, and is so liberal in providing for service as to leave no excuse for a departure from it by service on anyone else. 'It shall be sufficient to serve any process against or notice to a corporation on its mayor, rector, president, or other chief officer, or, in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation, against or to which the process or notice is, if it be a city or town on the president of the council or board of trustees, or in his absence, on the recorder, or any alderman, or trustee.' Code of Virginia 1860, p. 707, Ch. 170, Sec. 7."

In this case service was made on the auditor of the corporation of Alexandria and not on any of the officers or persons

named in the Statute. The Court further discussing the question, say:—

"It appears from the bonds or certificate of debt in these cases that there was a mayor of the city. On him, if in the city, the law required service to be made. There is no return that he was absent, or any reason given why service was not made on him. There was, as it appears, a council, and a president of that council, and he is specially named in the statute as an officer on whom service may be made. No reason is given why service was not made on him."

"But if we could indulge in presumptions in favor of this jurisdiction, which would be against all sound principle, and suppose that both of these officers were absent, it should have been served on an alderman or councilman, since it appears there were alderman or councilmen."

"We are not informed whether there was a recorder to that city. If there was, he was not served. But, by a strange fatuity, almost the only officer not mentioned in the statute as one on whom the service may be made, is the one selected, while all those are omitted whom the law specifically points out as the proper ones, of whom there were several; and for whose omission in the matter of service no reason is given."

The pleadings in the case at bar are governed by the rules of the common law, and under those rules of pleading each party tacitly admits all material facts adversely alleged which he does not specifically deny.

Clement vs. Graham, 78 Vt. 290.

In the case at bar defendant is, and was at the time suit was instituted, a foreign corporation operating a railroad in Vermont as lessee thereof. This fact is alleged in the plea and not denied in the replication. There is nothing in the return that can reasonably be construed to mean that service was made on H. E. Folsom as the person in charge of, or having care of, the property attached. It appears in the plea that there were twenty-five station agents and depot masters in the employ of the Boston & Maine Railroad in Vermont. This is not denied in the replication. No reason is given for not making service on one of them. No facts are alleged in the replication that meet or answer the facts alleged in the plea nor that are material to the issue.

The replication alleges a single legal conclusion of plaintiff. A demurrer does not admit the accuracy of the adversary's legal conclusions. It admits only facts well stated.

The plea was sufficient. It set forth all the facts necessary to show that the service was not good.

The officer making service of the writ is required by statute to make a return of his proceedings thereon and that return, until impeached or amended, is the exclusive evidence of what was done. If the return does not show a sufficient service, there is none. Nothing will be presumed to help out the return and to give the Circuit Court jurisdiction.

Alexandria vs. Fairfax, 99 U. S. 774; 24 L. Ed. 583;
Bors vs. Preston, 111 U. S. 252; 28 L. Ed. 419.

Consequently, in a plea in abatement, it is only necessary to show such matters as fully avoid the effect of the return on the writ as made. The plea of the petitioner in this case did this, and was, consequently, sufficient. It was not necessary for the plea to negative all possible kinds of service which might have been made, but which were not shown by the return to have been made.

That the return of this writ fails to show a legal service is fully shown by what has been said above.

We submit that the Court below committed error in overruling said demurrer and adjudging said plea insufficient.

C. EACH OF SAID QUESTIONS WAS BEFORE THE CIRCUIT COURT OF APPEALS FOR ITS DETERMINATION AND SAID COURT HAD JURISDICTION TO DETERMINE BOTH OF SAID QUESTIONS.

The questions relating to the sufficiency of said writ and service were clearly raised in the Circuit Court for the District of Vermont and in the Circuit Court of Appeals by defendant's motion to dismiss (Tr. p. 23, f. 69 to p. 28, f. 77, incl.), assignment of errors 3-15 (Tr. p. 177, f. 531, p. 179, f. 537), by defendant's plea (Tr. p. 18, f. 53 to p. 22, f. 66) and assignment of errors 16-28 (Tr. pp. 179, f. 537 to 181, f. 541).

The original writ appears in the Tr. p. 5, f. 14 to p. 15, f. 43, inclusive, and the officer's return in Tr. p. 15, f. 44.

U. S. Statutes, Chapt. 517 of March 3, 1891, establishing the Circuit Court of Appeals, provides, among other things:

"Sec. 5, That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases:

In any case in which the jurisdiction of the court is in issue:

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,

And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or *citizens of different states;* * * *

Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

* * * And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified to the supreme court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

In this case the question of jurisdiction arises purely and solely from two questions: First, is the writ made in the form required by the United States statutes? Second, was it so served as to give the Court jurisdiction of the person of the defendant? Judge Wallace, in his opinion, holds that these two questions are with the defendant and that the Circuit Court of Appeals should dismiss the cause for want of jurisdiction, for the reason that neither the process nor the service are such as to sustain the suit.

The other two judges hold that the Circuit Court of Appeals has no jurisdiction to pass upon that question, viz., the sufficiency of the writ or the sufficiency of the service.

In United States vs. Jahn, 155 U. S. 109; 39 L. Ed. 87, which is a case under the revenue law appealed from the General Appraiser to the Circuit Court of the United States, which reversed the decision of the appraisers. It was then carried by the United States to the Circuit Court of Appeals, the jurisdiction of the Circuit Court was challenged on the appeal, and the U. S. Circuit Court of Appeals certified a question to the Supreme Court of the United States. The importers denied that the Circuit Court of Appeals had authority to certify the question of jurisdiction to the Supreme Court. The Supreme Court held that it was properly certified, and also held that the Supreme Court, in the absence of request for instructions, might, by *certiorari* or otherwise, require any such case to be certified to it for review, and on page 113 use the following language: "The act certainly did not contemplate two appeals or writs of error at the same time by the same party to two different courts, nor does it seem to us that it was intended to compel a waiver of the objection to the jurisdiction altogether or of the consideration of the merits. By taking a case directly to this Court on the question of jurisdiction, the contention on the merits would be waived, *but it does not follow that the jurisdictional question could not be considered, if the case were taken to the Circuit Court of Appeals.* The act was passed to facili-

tate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, but the rights of review by appeal or writ of error, and of invoking the supervisory jurisdiction of this tribunal, were sought to be amply secured and should not be circumscribed by too narrow a construction. * * * *We do not think the act involves such a dilemma*; but, on the contrary, are of opinion that the Government would have had the right to carry the cause to the Court of Appeals, *which could then have certified the question of jurisdiction to this Court for determination. Of course, the power to certify assmes the power to decide*; but if decided there by *certiorari*, when necessary, the same review could be obtained here as on certificate for instruction."

In Carter *vs.* Roberts, 177 U. S., 496, the Court, discussing the duty of the Court of Appeals where a jurisdictional question or a constitutional question is involved, on page 500, hold: "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal lies to this Court, and if such cases are carried to the Circuit Court of Appeals, those courts may decline to take jurisdiction; or *where such construction or application is involved with other questions may certify the constitutional* question and afterwards proceed to judgment, *or may decide the whole case in the first instance.* * * * But when the Circuit Court of Appeals has acted on the whole case its judgment stands unless revised by *certiorari* to or appeal from that court in accordance with the Act of March 3, 1891."

In American Sugar Refining Company *vs.* City of New Orleans, 181 U. S., 277, the question was again before the Court on a petition for *certiorari* or mandamus to review a decision dismissing a writ of error for want of jurisdiction. In discussing the effects of the 5th and 6th sections of the Court of Appeals act the Supreme Court held: "The jurisdiction referred to is the jurisdiction of the Circuit Court, and as the judgment of the Court of Appeals is made final in all cases in which the jurisdiction of the Circuit Court attaches solely by reason of diverse citizenship, it follows that the Court of Appeals has power to review the judgment of the Circuit Court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the Circuit Court attached, by reason whereof the case became embraced by Section 5. * * * If plaintiff, by proper pleading, places the jurisdiction of the Circuit Court on diverse citizenship, and also on grounds

independent of that, * * * and the case is taken to the Court of Appeals, propositions as to the latter grounds may be certified; or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide) an appeal or writ of error would lie under the last clause of Section 6, because the jurisdiction would not depend solely on diverse citizenship. * * * Undoubtedly where the jurisdiction of the Circuit Court depends solely on diverse citizenship, and it turns out that the case involves the construction or application of the Constitution of the United States, or the constitutionalty of a law of the United States, or the validity or construction of a treaty, is drawn in question, or the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States, the Circuit Court of Appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised, *or may decide the whole case;* but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the Circuit Court of Appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. * * * In the case at bar the jurisdiction rested on diverse citizenship. Two defenses were interposed. * * * Both defenses were overruled and judgment rendered for the plaintiff. The case was then carried on error to the Circuit Court of Appeals,which gave judgment dismissing the writ of error for want of jurisdiction. In this we think the Court erred and that a *certiorari* should issue that its judgment to that effect may be revised."

In Louisville Trust Co., Receiver, etc., *vs.* Knott, 191 U. S. 225, the Supreme Court discussed the meaning of the word *jurisdiction* in the Judiciary Act of March 3, 1891.

In this case litigation was commenced in a State court against the property and estate of the Evening Post Co. While that was pending Mr. Knott brought suit against the Evening Post Co. returnable to the United States Circuit Court and procured judgment therein. Thereafter Mr. Knott obtained execution which was returned into the United States Circuit Court unsatisfied.

Thereupon he brought a petition to the United States Circuit Court praying for the appointment of a receiver to take charge of and administer the estate of the Evening Post Com-

pany. The United States Circuit Court appointed such receiver and he took possession of the property.

Thereupon the plaintiff in the action in the State court asked that court to appoint a receiver, and objection to this was made by the parties who had procured the receiver to be appointed in the United States court. Their objection was overruled and the State court appointed a receiver.

Thereafter the State Court directed its receiver to intervene in the suit in the Federal court and claimed the estate in question for administration and settlement in the State court. The State court held that its jurisdiction to administer the estate first attached.

Thereupon the Receiver appointed by the State court intervened and filed a motion that the Receiver of the Federal court be directed to turn the property over to the Receiver of the State court. This action was first commenced in the Federal court on the ground of diverse citizenship. The Federal Judge on hearing dismissed the intervening petition on the ground that the Federal court had jurisdiction.

Thereupon the case was carried to the Supreme Court.

Mr. Justice Harland delivered the opinion. On page 232 he says:

"By the Judiciary Act of March 3, 1891 * * * an appeal or a writ of error, as the one or the other mode may be proper, can be taken directly from a Circuit Court to this Court in certain specified cases, among which is 'any case in which the jurisdiction of the Court is in issue'; and 'in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision' (Sec. 5). In all cases, other than those specified in Section 5 of that act, the Circuit Court of Appeals is given appellate jurisdiction (Sec. 6).

The question presented by the certificate of the Circuit Court is not one of *jurisdiction* within the meaning of the 5th section of the Act of 1891, and the jurisdiction of that court was not 'in issue.' There was diversity in the citenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit Court, as a Federal court, to take cognizance of it. The issue made by the intervening petition of the Louisville Trust Co. did not involve the juris-

diction of that court, as a Federal tribunal, to appoint a receiver of the assets and property of the Evening Post Co."

After discussing the purposes and objects of that suit in the Federal court he further says on page 233:

"In all this there was nothing involving the jurisdiction of the Circuit Court as a Federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this Court directly must be one involving the jurisdiction of the Circuit Court as a Federal Court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

After discussing the decisions in other cases he proceeds on page 235 as follows:

"We repeat that the jurisdiction of the Circuit Court was not and is not questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity, to do that of which complant was made by the Louisville Trust Company. We do not think that Congress intended that any such question should be the basis of a direct appeal to this Court from the Circuit Court."

Later, on the same page, the Judge quotes with approval from the case of Blythe *vs.* Hinckley, 173 U. S., 501:

"Appeals or writs of error may be taken directly from the Circuit Court to this Court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this Court. The Circuit Court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit Court had no jurisdiction as a court of United States."

And on page 236 he concludes thus:

"In the circumstances of the present case, and to avoid misapprehension in the future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the 5th Section of the Judiciary Act of 1891.

For the reasons stated, the appeal from the Circuit Court must be dismissed for want of jurisdiction. in this court."

We respectfully submit that on the strength of this case the Circuit Court of Appeals should determine whether the said writ and the service thereof were sufficient.

That these questions do not challenge the jurisdiction of the United States Circuit Court as a Federal tribunal. That the question raised by these objections is not such a question as gives right of direct appeal to the United States Supreme Court.

That this is a question within the jurisdiction of the Court of Appeals, in the first instance, and that it is a question inherent in every Court to determine whether a particular process and the service thereof is sufficient to give it jurisdiction of the process and the person.

This action being originally commenced in the Circuit Court on the ground that the plaintiff was a citizen of Vermont and the defendant a citizen of Massachusetts, we respectfully submit that the 6th section of this Judiciary Act of 1891 gives the Circuit Court of Appeals final jurisdiction of every question which is raised therein, and that if the defendant had taken a writ of error direct to the Supreme Court of the United States assigning these two questions as error on the ground that they were jurisdictional questions within the 5th section of this act, this Court would have dismissed the writ of error for want of jurisdiction as it did in the case of the Louisville Trust Co., Receiver, against Knott, above cited.

D. THERE IS A DIVERSITY OF HOLDINGS AMONG VARIOUS UNITED STATES CIRCUIT COURTS OF APPEALS WITH RELATION TO THEIR JURISDICTION TO DETERMINE QUESTIONS AFFECTING THE JURISDICTION OF THE CIRCUIT COURTS.

An examination of the holdings of the different Circuit Courts of Appeals on the questions presented in this case shows a diversity of opinion among said Courts, with a majority of them holding that said Courts have jurisdiction to determine questions affecting the jurisdiction of the various Circuit Courts when those questions come before the Circuit Courts of Appeals in connection with other questions, and especially in cases where the jurisdiction of the Circuit Court rests upon diversity of citizenship.

Judge Coxe in the opinion for the majority of the Court in this case says: (Tr. p. 195)

"We refrain from discussing the jurisdictional question argued at the bar and in the briefs, for the reason that this Court since its organization has uniformly held that the act creating the Circuit Courts of Appeals confers no authority upon these Courts to pass upon questions challenging the jurisdiction of the Circuit Courts."

The Circuit Courts of Appeals for the first, fifth, sixth, seventh and eighth circuits hold that they have jurisdiction to determine the questions affecting the jurisdiction of the Circuit Courts, which holdings are directly opposed to the holdings of the Circuit Court of Appeals for the Second Circuit in this and other cases.

In Grand Trunk Ry. Co. vs. Twitchell, 59 Fed. 727, the Circuit Court of Appeals for the First Circuit held that it is the duty of a Federal Appellate Court to take notice of its own motion that the record does not show jurisdiction in the court below, and thereupon to remand the cause and, further, that on a writ of error in an action which appears to have been improperly removed, the Appellate Court had jurisdiction, so far as to determine whether the Circuit Court has jurisdiction, to hear

and determine the case on its merits and has jurisdiction, therefore, to award costs.

In this case the action was originally brought in the State Court and removed to the Circuit Court for the District of New Hampshire, where it was tried by a jury and removed to the Circuit Court of Appeals on a writ of error and there fully argued, neither party making any question as to the jurisdiction of the Circuit Court or of the Circuit Court of Appeals, but the Circuit Court of Appeals, of its own motion, took cognizance of the fact that jurisdictional facts did not appear and remanded the cause to the State Court.

In King vs. McLean Asylum of Massachusetts General Hospital, et al., 64 Fed. Rep. 325, the Circuit Court of Appeals for the First Circuit held that it had jurisdiction to determine on an application for habeas corpus, the questions relating to the jurisdiction of the Circuit Courts where other questions were involved.

Putnam, Circuit Judge, rendering the opinion says: (p. 326)

"Notwithstanding the letter of the Act establishing this court as found in the opening paragraph of the sixth section apparently deprives this court of jurisdiction over fundamental questions touching the jurisdiction of the Circuit Courts, yet, in view of the provision found in the first clause of the fifth section for specially certifying questions of that particular class to the Supreme Court, that court has held that, notwithstanding that clause, we have jurisdiction over such questions, unless the issue has been made in the court below and certified to the Supreme Court as directed by the statute. We need cite only the latest cases on this point. Cary vs. R. R. Co. 150 U. S. 170 and Maynard vs. Hecht, 151 U. S. 324. These decisions render it unnecessary that we should consider Manufacturing Company vs. Barber, 60 Fed. 465, or Sugar Refining Company vs. Johnson, 60 Fed. 503. We are clear that this rule is not limited by the subsequent clause of the same fifth section, touching cases involving the construction or application of the Constitution of the United States, and that we have jurisdiction, on records in the form of that now before us to pass on the jurisdiction of the Circuit Courts as much when that jurisdiction is contested on constitutional grounds as when it depends solely on the construction

of statutes. In this instance, subsequent enumeration in the statute does not operate as an exclusion. In view of the fact that the jurisdiction of the Circuit Courts may always be challenged on constitutional grounds, any other interpretation would bring the statute to unfruitful results."

In American Sugar Refining Co. vs. Johnson, 60 Fed. Rep. 503, the Circuit Court of Appeals, Fifth Circuit, holds:

That when the whole case is taken to the Circuit Court of Appeals, that court has jurisdiction to pass upon the question of jurisdiction of the court below.

Pardee, Circuit Judge, says: (p. 507)

"The record shows that the question of jurisdiction of the Circuit Court was not raised in the court below and of course the jurisdiction is not certified as involved in the case. The first assignment of error raises the question in this court that the jurisdiction of the Circuit Court does not appear from the face of the record. The appellee relying upon the textual provisions of section 5 of the judiciary Act of 1891 * * * * contends that this assignment of error cannot be considered in this court."

The court then cites from Railway Company vs. Swan, 111 U. S. 379, 389; and from McLish vs. Roff, 141 U. S. 661, 668; also from Cary vs. Railway Company, 150 U. S. 170; and then says: (p.509)

"Reading the fifth and sixth sections of the act of 1891 in the light of McLish vs. Roff and Cary vs. Railway Company and the former practice of this court, we consider that the exclusive jurisdiction of the Supreme Court in any case where the jurisdiction of the court is issne, only attaches when the appeal or writ of error is taken direct to that court and that when not so taken but the appeal or writ of error is taken on the whole case to the Circuit Court of Appeals, that court is vested with jurisdiction to pass on all the issues involved or to certifving a jurisdictional question to the Supreme Court in such cases; that is only to be done when the instruction of that court is desired for the proper decision of the case. Watch Company vs. Robbins, 148 U. S. 266.

"We consider therefore that we have full jurisdiction to pass upon the first assignment of error in thiscase."

And the court held that the averments of the complaint were not sufficient to give the Federal Court jurisdiction.

In Texas & Pacific R. R. Co. vs. Bloom, 60 Fed. 979, the Circuit Court of Appeals for the Fifth Circuit affirmed the doctrine in American Sugar Refining Co. vs. Johnson above, reaffirming their jurisdiction to pass upon the jurisdiction of the Circuit Court.

In Snead vs. Sellers et al, 66 Fed. Rep. 371, the Circuit Court of Appeals for the Fifth Circuit held that it is the duty of an Appellate Court to direct the dismissal of the case where the complaint shows that the requisite diverse citizenship does not exist. The Circuit Court of Appeals in this case took jurisdiction of the action to the extent necessary to determine that the Circuit Court had no jurisdiction and on its order, the case was dismissed with costs.

In Coller vs. Grainger County et al, 74 Fed. Rep. 16, the Circuit Court of Appeals for the Sixth Circuit, Judge Taft delivering the opinion, held that when the record, upon an appeal from the Circuit Court to the Circuit Court of Appeals, presents both a question as to the jurisdiction of the former court and other questions, which, if the Circuit Court is found to have had jurisdiction, must be disposed of, the Court of Appeals has jurisdiction of the appeal and must consider the question of the jurisdiction of the Circuit Court, although that Court has dismissed the case for want of jurisdiction, and the Circuit Court of Appeals Act provides (Sec. 5) that where the question is alone of jurisdiction, it is to be certified to the Supreme Court. Judge Taft says in the opinion:

"In such a case it is quite clear that an appeal lies to this court and that *ex necessitate* this court must consider the question of jurisdiction in order that it may proceed to decide the other questions raised upon the merits."

The court entertained the question of jurisdiction and decided it.

In Baltimore & Ohio R. R. Co. vs. Meyers, 62 Fed. Rep. 367, the Circuit Court of Appeals for the Seventh Circuit held that where the jurisdiction of the court below is not the sole question presented by the record, but other questions are involved, the Circuit Court of Appeals is authorized to determine that question, as well as the others.

Jenkins, Circuit Judge, delivered the opinion and among other things says: (p. 371)

"The statute organizing this court provides for appeals or writs of error to the Supreme Court from the Circuit Court in any case in which the jurisdiction of the court is in issue, and that in such case the question of jurisdiction shall alone be certified to the Supreme Court from the court below * * * * notwithstanding our recent ruling in Manufacturing Company vs. Barber, 60 Fed. 465, that when the sole question presented by the record goes to the jurisdiction of the court below, we are without authority to determine the question, we do not doubt, in view of the recent decision of the Supreme Court in Maynard vs. Hecht, 151 U. S. 324, that when, as in this case, other questions are involved, we are authorized to determine that question as well as the others."

The court then goes on to consider the question of jurisdiction and winds up as follows on this branch of the case:

"The objection to the jurisdiction is of such slight merit that we do not feel ourselves warranted in the submission of the question to the Supreme Court."

In Rust vs. United Water Works Company, 70 Fed. 129, the Circuit Court of Appeals for the eighth circuit held that it had jurisdiction to determine the jurisdiction of the court below.

Sanborn, Judge, delivering the opinion, says: (p. 131)

"The defendant in error challenges the jurisdiction of this court to hear and determine the questions presented by the assignments of error. It moves to dismiss the writ of error on four grounds.

1. Because the jurisdiction of the court below to render the judgment against the American Water Works Company, which the plaintiff in error, the receiver of that company, sought by his petition to vacate and to defend against, was in issue at the hearing below, which resulted in the judgment denying the prayer of the petition, and it maintains that this question of jurisdiction can only be reviewed by the Supreme Court of the United States. But the plaintiff in error, by the allegations in his petition, placed his claim for an order vacating the judgment against the American Water Works company, and permitting him to answer for that company, on two grounds: That the Court had no jurisdiction to render the judgment; and, if it had, that the judgment was obtained by collusion, in fraud of the rights of the corporation and of the plaintiff in error, and that they had a meritorious defence to

the action, which he ought to be permitted to interpose. The judgment below denied him relief on either of those grounds, and the latter did not necessarily involve any question of jurisdiction. When a final judgment or decision has been rendered in a District or Circuit Court of the United States, the party against whom it is rendered may elect to take his writ of error to the Supreme Court, upon the question of jurisdiction alone, or to the Circuit Court of Appeals, upon the whole case. When he chooses the latter course, the Circuit Court of Appeals has jurisdiction to determine the question of the jurisdiction of the court below , as well as all other questions in the case properly presented to it for consideration. McLish vs. Roff, 141 U. S. 661; 12 Sup. Ct. 118; Crabtree v. Madden, 4 C. C. A. 408, 410, 54 Fed. 426; Crabtree v. Byrne, 4. C. C. A. 414, 54 Fed. 432; Sugar Refining Co. v. Johnson, 9 C. C. A. 110, 60 Fed. 503; Sugar Refining Co. v. Tatum, 9 C. C. A. 121, 60 Fed. 514."

In United States Freehold Land & Emigration Co. vs. Gallegos et al, 89 Fed. 769, the Circuit Court of Appeals for the Eighth Circuit, held that where a demurrer challenging the jurisdiction of the Circuit Court and also the sufficiency of the facts alleged in the bill to constitute a cause of action is sustained on the latter grounds an appeal by the plaintiff lies to the Circuit Court of Appeals which may determine the question of jurisdiction.

In McCord Lumber Co. et al vs. Doyle, 97 Fed. 22, the Circuit Court of Appeals for the Eighth Circuit had before it a question involving the sufficiency of the service of process on a foreign corporation, and that court took jurisdiction and determined the question presented as to the sufficiency of the service, holding, that a mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations which is recognizable by the local courts as valid, will receive the same recognition by the Federal Courts, subject to the limitation that such courts will determine for themselves whether the mode prescribed violates the fundamental rights of the defendant not to be condemned unheard or forced to answer a complaint in a foreign jurisdiction without a fair and reasonable notice.

We respectfully submit that for all the reasons hereinbefore stated, as well as for the reasons stated in the petition, your Honorable Court should grant a writ of certiorari requiring the United States Circuit Court of Appeals for the Second Circuit to certify this case to this court for it to hear and determine the questions herein considered with relation to the sufficiency of the writ returnable to the Circuit Court of the United States for the District of Vermont, and the sufficiency of the service thereof; and the jurisdiction of the Circuit Court of Appeals to determine said question or that this Court should award a writ of mandamus addressed to said Circuit Court of Appeals for the Second Circuit, commanding said Court to hear and determine the questions presented upon the writ of error with relation to the sufficiency of said original writ and service.

Respectfully submitted,

EDGAR J. RICH,
North Station,
Boston, Mass.
Of Counsel.

JOHN YOUNG and
GEORGE B. YOUNG,
Newport, Vermont.
Attorneys for Petitioner.

Office Supreme Court, U. S.
FILED.
JAN 13 1908
JAMES H. McKENNEY,
CLERK.

BRIEF FOR PETITIONER.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 198.

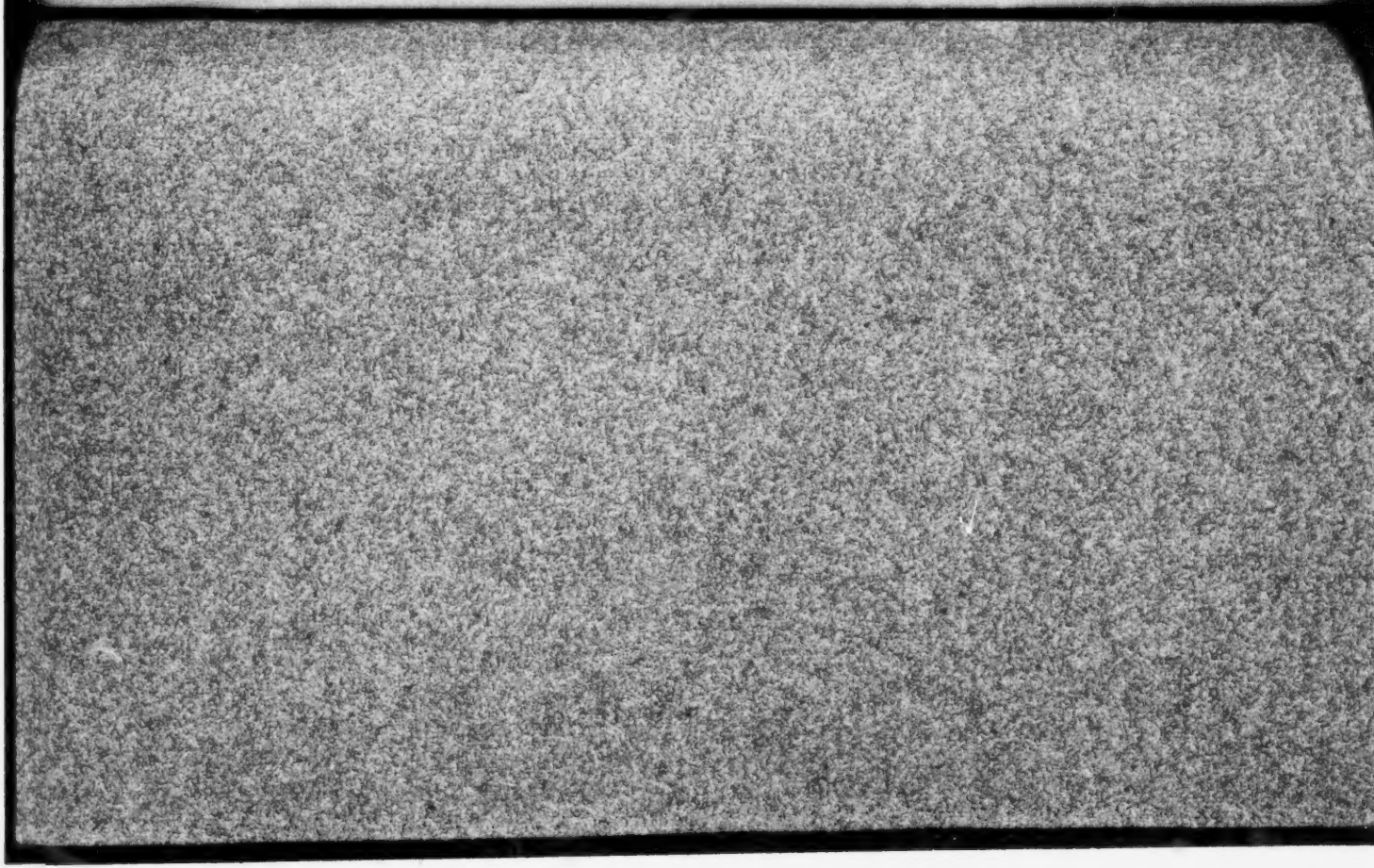
THE BOSTON AND MAINE RAILROAD, PETITIONER,

vs.

JOHN N. GOKEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER
By JOHN YOUNG AND GEORGE S. YOUNG.
NEWPORT, VERMONT.



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STATEMENT OF THE CASE.

The original suit of John N. Gokey v. Boston & Maine Railroad, returnable to the United States Circuit Court for the District of Vermont, is an action of case for negligence, wherein the plaintiff seeks to recover for injuries sustained by him in the Lyndonville, Vermont, yard of the Railroad Company on the 2d day of November, 1901, by being knocked from the side of a stock rack car by a switch target, whereby one leg was so injured that it was necessary to amputate the leg at about the junction of the lower and middle thirds. The original writ, returnable to said Circuit Court, was dated April 25, 1904 (Tr. p. 9, f. 15), was returnable to a term of said Court holden on the third Tuesday, being the 17th day, of May, 1904 (Tr. p. 4, f. 5), and was served May 2, 1904 (Tr. p. 9, f. 15). Said writ was dated twenty-two days, and served only fifteen days before the term of court to which the same was made returnable.

On said 17th day of May, 1904, the Boston & Maine Railroad entered a special appearance in said cause solely for the purpose of filing a plea in abatement and moving to dismiss said writ (Tr. p. 15, f. 26).

(*a*) Because said writ did not conform to the statutes of the United States, nor to the statutes of the State of Vermont, nor to the rules of said United States Circuit Court for the District of Vermont, nor to the forms of writs in use in the State Courts in the State of Vermont.

(*b*) Because the service of said writ was not made in accordance with the statutes of the United States, nor of the State of Vermont, nor the practice in the State of Vermont, nor any rule prescribed by said United States Circuit Court for the District of Vermont.

Said defendant seasonably filed a motion to dismiss, on said grounds (Tr. pp. 14-15) which was heard and overruled by the Court (Tr. p. 17, ff. 29-31). Said motion is as follows:

(TITLE OF CAUSE.)

MOTION TO DISMISS.

"Now comes the defendant in the above-entitled cause, the Boston & Maine Railroad, by its attorneys, solely for that purpose, and moves to dimiss said action for the following reasons:

"First. Because the original writ in this cause was not issued in accordance with the provisions of Section 911 of the Revised Statutes of the United States in this, that said writ is not under the seal of this Court.

"Second. Because the original writ in this cause is not in accordance with the provisions of Section 914 of the Revised Statutes of the United States.

"Third. Because said writ was not served in accordance with the provisions of Section 914 of the Revised Statutes of the United States.

"Fourth. Because said writ is not in conformity with Sections 1060, 1088, 1089 and 1090 of the Vermont Statutes and No. 137 of the Acts of 1898 as to form, time of service, time of return, nor as to the time when the defendant is required to appear in said cause, nor as to the time when the

defendant shall answer to said action; but, on the contrary thereof, the writ in this cause is made returnable twenty-two days from its date and requires the defendant to appear in Court and to answer to said action twenty-two days from the date of said writ.

"Fifth. Because the writ in this cause does not contain the following direction to the officer, viz.: 'Fail not but service and return make within twenty-one days from the date hereof.'

"Sixth. Because said writ is not in accordance with the statute law of Vermont which was in force June 1, 1872, and which required that a writ against a corporation should be served at least thirty days before the session of the Court to which it is made returnable; whereas, the writ in this cause bears the date the 25th day of April, 1904, and is made returnable on the third Tuesday of May then next, which is the 17th day of May, 1904, and which is only twenty-two days before the session of the Court to which it is made returnable.

"Seventh. Because the writ in this cause is made returnable to a session of Court to be held less than thirty days from the day of the date of said writ.

"Eighth. Because the original writ in said cause was not served upon the defendant at least thirty days before the session of Court to which it is made returnable.

"Ninth. Because the original writ in said cause was not served upon the defendant 'by leaving a copy of the process with a station agent, or depot master, in the employment of the defendant,' as required by Vermont Statutes, Sections 3948, 3949.

"Tenth. Because the defendant is a corporation organized and existing under and by virtue of

the laws of Massachusetts and is a citizen of Massachusets, and before and at the time of the issuance of the original writ in this cause 'operated and maintained said certain railroad and the appurtenances thereto belonging, to wit, at Lyndon, in the County of Caledonia, and District of Vermont,' as lessee of said railroad property and not otherwise;and the original writ in this cause was not served upon the defendant 'by leaving a copy of the process with a station agent, or depot master, in the employment of the defendant,' as required by Vermont Statutes, Sections 3948, 3949.

"Eleventh. Because the pretended attachment of defendant's engines numbered 650 and 651 is not made in accordance with the Vermont Statutes, Section 1109, in that no copy of the attachment and list of the articles attached, attested by the officer serving the same, was delivered to the defendant, nor left at its then usual abode, nor left with its known agent or attorney, nor left at the place where such goods or chattels were attached, by reason whereof said pretended attachment is absolutely null and void.

"Twelfth. Because this Court has no jurisdiction of said action.

"Thirteenth. Because there are no allegations in the writ or in the declaration averring the diversity of citizenship of the parties to said action and no allegation or allegations giving this Court jurisdiction of said cause.

"Fourteenth. Because the Court has no jurisdiction of the defendant.

"The original writ and declaration and the officer's return thereon are referred to and made a part of this motion.

BOSTON & MAINE RAILROAD,
By its Attorneys, YOUNG & YOUNG."

Said defendant also seasonably filed a plea in abatement (Tr. pp. 11-14) to which the plaintiff in said suit replied (Tr. p. 16. f. 27), and to said replication the defendant demurred (Tr. p. 18, ff. 32-33).

Said plea in abatement filed May 17th, 1904 is as follows (Tr. p. 11, f. 18):

(TITLE OF CAUSE)

DEFENDANT'S PLEA.

"And now the defendant in the above-entitled cause, the Boston & Maine Railroad, by its attorneys, Young & Young, comes and defends the wrong and injury when, etc., and says that at the time of the issuing of the original writ of the plaintiff in the above entitled suit, the defendant was and still is a corporation duly created, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts; that it then had, ever since has had and now has its principal office and place of business in Boston, in the County of Suffolk, in said Commonwealth of Massachusetts; that it then was, ever since has been and now is a citizen and resident of said Commonwealth of Massachusetts; that at the time of the issuing of the original writ in this cause, to wit, on the 25th day of April, 1904, this defendant was in possession of the property of and was managing and was operating the railroad of the Connecticut & Passumpsic Rivers Railroad Company in the State of Vermont, to wit, at Lyndon, in the County of Caledonia and District of Vermont, as a lessee of said railroad and railroad property, and was not operating said railroad or railroad property in any other capacity, way or manner except as such lessee; that this defendant then resided without the State of Vermont and was not a citizen of the State of Ver-

mont; that this defendant, at the time of the issuing of the original writ in this cause, to wit, on the 25th day of April, A. D. 1904, and at the time of the service of the original writ in this cause, to wit, on the 2d day of May, A. D. 1904, had and at all times since said 25th day of April, 1904, has had and now has a large number of station agents and depot masters, to wit, twenty-five station agents and depot masters, in its employ resident within the State of Vermont.

"And this defendant further says that at the time of the issuing of the original writ in this cause, to wit, on the 25th day of April, 1904, this defendant had not appointed and has not since appointed and had not on the day of the service of the original writ in this cause, to wit, on the 2d day of May, 1904, appointed and has not since appointed any person resident in the State of Vermont upon whom service of process issued against this defendant may or might be made and that this defendant had not on said 25th day of April, 1904, and has not since filed in the office of the Clerk of the County Court in any county through which said railroad passes, a certificate designating the name and residence of a person upon whom service of process issued against this defendant may be made and at the date when said original writ issued, to wit, on the 25th day of April, 1904, and at the date when Horace W. Bailey, United States Marshal for the District of Vermont, attempted to serve the original writ in this cause, there was no person residing within the State of Vermont authorized or appointed by this defendant as a person resident in this State upon whom service of process issued against this defendant may or might be made in accordance with Vermont Statutes, Sections 3948 and 3949, and there never has been since said 25th day of April, 1904, and is not now such a person resident within the State of Vermont.

"This defendant further says that the only service or attempted service of the orignal writ in this cause was made on the 2d day of May, A. D. 1904, at Lyndon, in the District of Vermont, by Horace W. Bailey, United States Marshal, in the manner and form shown by the return of said Marshal endorsed upon said writ, which return is in the words and figures following, viz.:

'UNITED STATES OF AMERICA,

District of Vermont, ss:

'At Lyndon, in said District, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within defendant The Boston & Maine Railroad Company its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. & M. R. R. Co., by H. E. Folsom, one of its accredited agents and a division superintendent within said District. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and superintendent aforesaid at his office at Lyndonville, in said district, with my doings thereon endorsed.

Attest: HORACE W. BAILEY,

United States Marshal.'

"This defendant further avers that no other, further nor different service was made of the original writ in this cause than the service shown by the said return endorsed upon said writ, and said original writ, with the return thereon, are referred to and made a part of this plea.

"This defendant further says that said Horace W. Bailey, United States Marshal, attempted to serve the original writ in this cause upon this defendant on the 2d day of May, 1904, at Lyndon, in

the District of Vermont, by attempting to attach as the property of this defendant two engines numbered 650 and 651, in the manner stated in the return endorsed upon said writ hereinabove set forth, and that no other nor different attachment of any property of this defendant upon the original writ in this cause was ever made or attempted to be made in any manner or form.

"This defendant further says that on the 2d day of May, 1904, at said Lyndon, said Horace W. Bailey, United States Marshal, attempted to make service of the original writ in this cause upon this defendant by leaving a true and attested copy of the original writ in this cause in the hands of H. E. Folsom, one of this defendant's 'accredited agents and a division superintendent within said district', at his office at Lyndonville, in said District, with said Marshal's doings thereon endorsed.

"This defendant further says that H. E. Folsom, the person upon whom service of the original writ in this cause was attempted to be made and to whom a copy of the original writ in this cause was delivered, was not on the day of the service of the original writ in this cause, to wit, on the 2d day of May, 1904, and never before said date was and never since said date has been a person residing within the State of Vermont upon whom service of process issued against this defendant may or might be made, and that said Folsom, on the day of the attempted service of the original writ in this cause, to wit, on the 2d day of May, 1904, was not and never has been since said date, and is not now a station agent or depot master in the employment of this defendant.

"And this defendant says that no other nor different service was ever made or attempted to be made of the original writ in this cause upon this defendant than the attempted service hereinabove stated; that no copy of said writ, that no notice of

said attachment, that no list of the articles attached, attested by the officer serving said writ was ever delivered to this defendant nor to any person resident in the State of Vermont appointed by this defendant as a person upon whom service of process against this defendant may be made, nor to any station agent nor to any depot master in the employment of this defendant.

"And this defendant says that this defendant has never accepted service of said writ in any way or manner.

"Wherefore, because no due nor proper nor legal service of the original process in this cause has ever been made upon this defendant, this defendant prays judgment of said writ, declaration and attempted service and that said writ and declaration may be dismissed.

BOSTON & MAINE RAILROAD,
By its Attorneys, YOUNG & YOUNG.

"John Young, one of the attorneys of the defendant in this cause and an attorney of this Court, maketh oath and saith that the foregoing plea is true in substance and fact.

"Sworn to at Windsor, in the District of Vermont, this 17th day of May, A. D. 1904, before me,

GEO. E. JOHNSON, *Clerk*."

Said replication filed May 31, 1904, is as follows (Tr. p. 16, f. 27):

(TITLE OF CAUSE)

PLAINTIFF'S REPLICATION.

"And the said plaintiff saith that his said writ by reason of anything by the said defendant in his

said plea alleged, ought not to be quashed, because he saith that the said H. E. Folsom was, on the day of the service of the original writ in this cause, to wit, on the second day of May, A. D. 1904, a person residing within the State of Vermont upon whom service of process issued against this defendant might be legally made, to wit, an agent of this defendant. And this he, the said plaintiff, prays may be inquired of by the country, etc.

JOHN N. GOKEY,
By HARLAND B. HOWE, *Attorney.*"

Said demurrer filed July 5, 1904, is as follows (Tr. p. 18, f. 32):

(TITLE OF CAUSE)

DEMURRER TO REPUBLICATION.

"And the said defendant saith that the replication of said plaintiff to the said plea of the said defendant and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law for said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that it, the said defendant, is not bound by law to answer the same. Wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment of said writ, declaration and attempted service of said writ and that said writ and declaration be quashed; and the said defendant, according to the form of the statute in such cases made and provided, states and shows to the Court here the following causes of demurrer in law to the said replication, that is to say:

"1st. That said plaintiff's replication does

not traverse any averment or averments in said plea;

"2nd. That said replication does not confess and avoid in whole or in part the matters and things set forth in the defendant's plea;

"3rd. That said replication avers a legal conclusion;

"4th. That said replication states no material fact nor facts which are traversable;

"5th. That said replication is not responsive to the defendant's plea;

"6th. That plaintiff's replication states no fact showing or tending to show that H. E. Folsom was a person upon whom service of process against this defendant could or might be properly or legally made;

"7th. That said replication avers no fact showing that said H. E. Folsom is an agent of this defendant upon whom process could or might be legally or properly made;

"8th. That said replication has no proper or suitable prayer in that it contains no prayer for the assessment of damages.

"And also for that the said replication is, in other respects, uncertain, informal and insufficient.

BOSTON & MAINE RAILROAD,
By its Attorneys, YOUNG & YOUNG."

Said demurrer was heard and overruled by said Court and the plea in abatement thereby held insufficient, in the following decision (Tr. pp. 19-21, ff. 33-36.)

(TITLE OF CAUSE.)

"Wheeler, J. This cause has now been heard on demurrer to a replication to a plea in abatement for defective service of the writ.

"The writ issued and was served as an attachment. The Vermont statutes provide:

" 'Sec. 1109. When the goods or chattels of a person are attached at the suit of another, a copy of the attachment and a list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, as directed in the service of summons, and if such person is not an inhabitant of the State, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached;'

" 'Sec. 21. The word person may extend and be applied to bodies corporate and politic.'

"Under these statutes writs of attachment properly issue against the property of corporations. *Dow v. School Dist., 46 Vt., 108.*

"The marshal's return showing the service made is:

" 'UNITED STATES OF AMERICA,

District of Vermont, ss:

" 'At Lyndon, in said district, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within named defendant, The Boston & Maine Railroad Company, its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. &. M. R. R. Co., by H. E. Folsom, one of its accredited agents and a Division Superintendent within said district. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and Superintendent afore-

said, at his office at Lyndonville, in said district, with my doings thereon indorsed.

Attest: HORACE W. BAILEY,
United States Marshal.'

"The plea fully denies any other or different service, and alleges that defendant was a non-resident lessee in possession of, and managing and operating a railroad in this State, and that Folsom was not at the time of the service and never 'has been a person residing within the State of Vermont, upon whom service of process issued against this defendant may or might be made.' The replication alleges that Folsom was as that time 'A person residing within the State of Vermont upon whom service of process issued against this defendant might be legally made, to wit, an agent of this defendant.' It is to this that the defendant has demurred.

"It is doubtful whether a replication to a plea in abatement is ever necessary; for in the strictness required of such a plea whatever might be brought forward by replication that would help the process should be met by the plea, or that would itself be bad. But if a replication to the plea instead of a demurrer is filed, if of itself bad, it might be good enough for a bad plea. The statutes of the State of Vermont, Stat., Sec. 3948, provide for the appointment by such a lessee of a person resident in the State upon whom service of process may be made. The known agent of a non-inhabitant with whom the copy of an attachment and a list of the articles attached may be left, may not be a person upon whom, by appointment, service of process generally may be made. Folsom may have been such an agent about this property attached, and not such an appointed person for service of process upon. And leaving a copy in the same custody as that of the goods or chattels attached would be

leaving it at the place where they were attached, although the custodian may have no other agency. *Hill vs. Warren, 54 Vt., 78.*

"The division superintendent of the railroad of the defendant designating the locomotives attached as its property might well be taken to be the known agent, or the accredited agent as styled by the marshal of the defendant about the custody of those articles, and leaving a copy of the attachment and a list of them with him would be a leaving with a known agent of the defendant within the meaning of the statute, or at the place where they were attached within the same meaning.

"The statutes provide, Vt. Stat., Sec. 3949, that on failure to appoint such a person for receiving service of process it 'May be made by leaving a copy of the process with a station agent or depot master in the employment of,' the lessee. The plea alleges that the defendant had at the time of the service many station agents and depot masters in its employment in this State, to wit, twenty-five, with whom a copy might have been left, and that Folsom was not one of them. But this statute only furnishes an additional mode of service, generally, and does not require service of an attachment to be made upon station agents or depot masters, nor supersede service of such process in the mode otherwise provided.

"The plea was bad for not denying Folsom's agency about, or custody of, the property, and the replication bringing that agency forward is good, or good enough for such a plea.

"Demurrer overruled, and replication adjudged sufficient."

And afterwards, and on the 30th day of September, A. D. 1904, the defendant filed a plea of the general issue in said cause (Tr. p. 21, f. 37).

Thereupon, said cause went to trial and was tried in said Circuit Court before the Hon. Hoyt H. Wheeler, Judge, and a jury, and a verdict returned in favor of the plaintiff for thirty-three hundred and fifty dollars (Tr. p. 23, f. 40).

Exceptions were duly allowed and filed and a writ of error taken to the United States Circuit Court of Appeals for the Second Circuit. An assignment of errors was filed in said Court, wherein the Boston & Maine Railroad assigned and alleged among others error on the part of the Circuit Court in overruling its said motion to dismiss and in adjudging its said plea in abatement insufficient (Tr. pp. 118-126, ff. 178-181).

In said United States Circuit Court of Appeals both parties argued the questions relating to the sufficiency of said writ and service. No suggestion was made upon the argument of said cause by either the court or counsel for Mr. Gokey that said Circuit Court of Appeals was without jurisdiction to determine the questions relating to the sufficiency of said writ and service.

Said Court by Judges Coxe and Townsend announced its decision in said cause, affirming the judgment below and declining to consider the questions as to the jurisdiction of the United States Circuit Court because said Circuit Court of Appeals was without jurisdiction to determine such questions.

Judge Wallace filed a dissenting opinion as follows (Tr. p. 129, f. 198 *et seq.*):

"Wallace, Circuit Judge (dissenting):

> "Error is assigned, among others, of the denial by the court below of the motion by the defendant to dismiss the action upon the ground that because the writ for the commencement of the ac-

tion was not properly served on the defendant the court had no jurisdiction of the defendant.

"The writ was dated April 25, 1904; was made returnable and notified the defendant to appear and answer at a term of the United States Circuit Court for the District of Vermont to be held on the 17th day of May, 1904; and was served by the marshal on the 2d day of May, 1904, by attaching property designated as the property of the defendant by one Folsom, its agent and division superintendent within the said district, and leaving a true and attested copy of the writ in Folsom's hands at his office in said district.

"Upon the return day mentioned in the writ, the writ together with the marshal's return was duly filed, and thereupon the defendant appeared specially for the purpose of the motion to dimiss and for the filing of a plea in abatement. The motion to dismiss was based upon the face of the writ and the marshal's return of service. The plea in abatement alleged facts qualifying the statements contained in the return of the marshal, and in substance asserted that the attempted service upon Folsom was unwarranted by the provisions of the statutes of Vermont. After the court had denied the motion to dismiss and had decided in effect that the plea in abatement was bad, the defendant answered upon the merits.

"The assignment of error which challenges the ruling of the court in refusing to dismiss the action presents the general question whether the court acquired jurisdiction of the person of the defendant. If the court did not by a valid service of an authorized process obtain jurisdiction, the judgment is subject to review on a writ of error taken directly to the Supreme Court. This proposition was considered and decided in Shepard v. Adams (168 U. S. 618), where the case was one in which the summons required the defendant to appear and

answer in a Federal Court of the District of Colorado within ten days from the time of service of the summons instead of thirty days as provided for the procedure of the state courts by the statutes of Colorado. Inasmuch as section 5 of the Act conferring jurisdiction upon this court provides that writs of error may be taken from the Circuit Courts direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, as well as in any case which involves the constitutionality of any law of the United States, or the validity or construction of any treaty, while section 6 provides that the Circuit Courts of Appeal established by the Act shall exercise appellate jurisdiction to review by writ of error final decisions in all cases other than those provided for in section 5, the question arises whether this court can properly undertake to decide whether there was jurisdiction in the court below. In United States v. Lee Yen Tai (113 Fed. Rep. 465) we held that this court was not authorized to decide the validity or construction of a treaty; and in Fisheries Co. v. Lennan (130 Fed. Rep. 533), following that judgment, we decided that an appeal presenting the question of the jurisdiction of the Circuit Court, as well as other questions relating to the merits of the controversy, did not authorize this court to pass upon the jurisdiction of the court below. These two decisions were based upon our understanding of the decisions of the Supreme Court in United States v. Jahn (155 U. S. 109) and Carter v. Roberts (177 U. S. 496). Since these decisions, however, the Supreme Court has considered again the proper construction of sections 5 and 6 in American Sugar Refining Co. v. New Orleans (181 U. S. 277), and I think it is apparent from its opinion that we misinterpreted the meaning of its former decisions. I am now satisfied that unless we see fit to certify to the Supreme Court the question of jurisdiction, we have

authority, and it is our duty, to entertain and decide it in all cases where the jurisdiction of the Circuit Court is invoked solely because of the diverse citizenship of the parties to the action.

"In Amy v. Watertown (130 U. S. 301) it was pointed out that although prior to the passage of the Act of June 1, 1872, it was always in the power of the Federal Courts, by general rules, to adapt their practices to the exigencies and conditions of the times, since the passage of that act the practice, pleadings and forms and modes of proceeding must conform to the state law and to the practice of the state courts, except when Congress has legislated upon a particular subject and prescribed a rule. And the court also declared that 'When a state statute prescribes a particular method of serving mesne process, that method must be followed; and this rule is especially exacting in reference to corporations.'

"The Act of June 1, 1872, now section 914 of the United States Revised Statutes, does not require a Circuit Court of the United States to observe a strict conformity in actions at common law to the practice and procedure existing at the time in such actions in the courts of the state within which the Circuit Court is held, but permits the Circuit Court to conform thereto 'as near as may be.' As was said in Ind. & St. L. R. R. Co. v. Horst (93 U. S. 291): 'This indefiniteness may have been suggested for a purpose; it devolved upon the judges to be effected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals.' In Shepard v. Adams (*supra*) a summons issued by the United States District Court for the District of Colorado which required the de-

fendant to appear within ten days from the time of service was held to sufficiently conform to the statutes of Colorado regulating the practice of the state courts although those statutes provided that the time within which a summons should require the defendant to appear was twenty days. This conclusion was reached because the summons by the Federal Court was issued pursuant to a rule of that court which was adopted when the existing statutes of the state prescribed that summonses should require the defendant to appear within ten days, but which rule was not changed to conform to a subsequent change in the statutes of Colorado. The court said: 'We have a right to presume that the discretion of the District Court was legitimately exercised in both adopting and maintaining the rule in question.' It is apparent from the reasoning of the opinion that the summons would have been held invalid if it had not been issued in pursuance of a rule of the Federal Court which conformed substantially when it was adopted to the state statutes.

"The statutes of Vermont in force at the time of the issuing of the present writ, and for many days before, contained the following provisions applicable to the service of writs in actions like the present.

" 'Sect. 1088. Every writ and process returnable before the supreme and county courts, except as otherwise provided, shall be served within twenty-one days from the date of issuing the same, including the day of service, and excluding the day of issuing, and shall contain the following direction to the officer, viz.: 'Fail not but service and return make within twenty-one days from date hereof.'

" 'Sect. 1089. The party suing out such process shall cause the same to be entered and docketed in the county clerk's office on or before the expir-

ation of said twenty-one days, or the process shall on motion abate.'

" 'Sect. 1090. The defendant shall cause his appearance therein to be entered with the clerk on or before the expiration of forty-two days from the date of such writ.'

"The only rule of the Circuit Court of the District of Vermont which touches the case is rule 8 which was adopted prior to the enactment of these provisions and provides as follows: 'All mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof according to the laws of the state, otherwise it shall be returnable to the next regular term thereafter.'

"There is nothing in the rule of the Circuit Court which impringes upon the statutory provisions, and these provisions require the writ to be served within twenty-one days from its date of issuing, and allow the defendant twenty-one days at least after service in which to appear in the action. The present writ was not served or attempted to be served on the defendant until the 2nd day of May, 1904, or fifteen days previous to the time at which the defendant by the writ was notified to appear and answer. I cannot escape the conclusion that the motion to dismiss should have been granted.

"If process is not served pursuant to the required statutory time the service is nugatory unless cured by a voluntary appearance or waiver of the defendant. It was upon that ground only that the court assumed appellate jurisdiction in Shepard v. Adams. The defendant in the present case was deprived of the full opportunity to prepare its defense which the statute was intended to afford, and though it may have had in fact sufficient time, it was entitled to assert its statutory right. The denial of that right was error.

"There is respectable authority for the propo-

sition that if a defendant appears in order to take advantage of a defective process or service, and his motion to dismiss the suit on that ground is overruled, he cannot then answer and proceed to trial without making a virtual waiver of his objections. But the weight of authority is to the contrary. 'Where a special appearance is made in order to object to illegality in the service of process, or to urge any objection for which a special appearance is appropriate, such special appearance is not waived and converted into a general one by answering to the merits after the objections are erroneously overruled. It is only where the defendant pleads in the first instance to the merits, without any special appearance, that objections to personal jurisdiction are waived.' 2 Encyclopedia of Pleading & Practice, 629. That this is the law of the Federal Courts sufficiently appears by reference to Harkness v. Hyde (98 U. S. 476) and Southern Pacific v. Denton (146 U. S. 202).

"For these reasons I am of the opinion that the judgment should be reversed."

Your petitioner then filed a petition for a re-hearing of said cause on the question of the jurisdiction of said Circuit Court of Appeals to determine the questions argued before it with relation to the sufficiency of said writ and service, which petition was denied (Tr. pp. 133-135, ff. 205-212).

Thereupon this writ of Certiorari was issued that said decisions of said Circuit Court of Appeals for the Second Circuit might be reviewed.

SPECIFICATION OF ERRORS.

1. The Circuit Court for the District of Vermont, erred in holding the original writ in this cause, returnable to that Court, sufficient and said Circuit Court of Appeals for the Second Circuit committed error in refusing to consider the efficiency of said original writ, and in ommitting to adjudge the same insufficient.

2. Said Circuit Court for the District of Vermont erred in holding the service of said original writ sufficient and said Circuit Court of Appeals erred in refusing to consider the sufficiency of said service and in omitting to adjudge the same insufficient.

3. The Circuit Court of Appeals erred in refusing to consider and reverse the holding of said Circuit Court for the District of Vermont on the motion to dismiss said original suit made by this petitioner, the defendant in the original action.

4. The Circuit of Appeals erred in refusing to consider and reverse the holding of said Circuit Court for the District of Vermont on the demurrer of this petitioner, defendant in the original action.

5. The Circuit Court of Appeals erred in refusing to consider the questions affecting the jurisdiction of the Circuit Court for the District of Vermont, of the action.

6. The Circuit Court of Appeals erred in holding that it had no authority to pass upon questions challenging the jurisdiction of the Circuit Courts.

7. The Circuit Court of Appeals erred in rendering judgment for the petitionee in this cause, without determining, or asking this Court to determine, the jurisdiction of the Circuit Court for the District of Vermont of the original action.

8. The Circuit Court of Appeals erred in holding that it had no power or jurisdiction to consider or determine questions properly presented by the record, affecting the jurisdiction of the Circuit Court, when such questions arise with other questions properly before said Circuit Court of Appeals.

PETITIONER'S CLAIMS AND AUTHORITIES.

I.

The original writ in the suit of John N. Gokey v. Boston & Maine Railroad, returnable to the United States Circuit Court for the District of Vermont was insufficient.

Writ, Tr. pp. 3-9, ff. 4-15.
Revised Statutes of the United States, Sec, 914.
Rules of the United States Circuit Court for the District of Vermont, No. 7 and 8.
Judiciary Act of Vermont, of March, 1797.
Revised Statutes of Vermont, 1839, Chap. 28, Sec. 10:
General Statutes of Vermont, 1863, Chap. 33, Sec. 19.
Revised Laws of Vermont, 1880, Sec. 868.
Vermont Statutes, 1894, Sec. 1088, 1089, 1090.
Laws of Vermont, 1898, No. 137.

II.

The Boston & Maine Railroad, being a foreign corporation and a non-resident of Vermont, the Circuit Court could not acquire jurisdiction of the original action, nor of this petitioner, the defendant

therein, except by a valid attachment of property of this petitioner in Vermont and a legal service of the original writ in accordance with the laws of the State of Vermont. No such service nor attachment was made and the Circuit Court for the District of Vermont acquired no jurisdiction of the original action nor of the defendant therein, the petitioner here.

Return of Service, Tr. p. 9, f. 15.
Revised Statutes of the United States, Sec. 914.
Rule 8 of the United States Circuit Court for the District of Vermont.
Judiciary Act of Vermont, of March, 1797.
Revised Statutes of Vermont, 1839, Chap. 28, Sec. 10.
General Statutes of Vermont, 1863, Chap. 33, Sec. 19.
Revised Laws of Vermont, 1880, Sec. 868.
Revised Statutes of Vermont, 1894, Secs. 1088, 1089, 1090, 3747, 3948, 3949, 1104, 1109.
Hill v. Warren, 54 Vt. 73.
Folsom v. Conner, 49 Vt. 4.
Rollins v. Clement, 49 Vt. 98.
Clark & Freeman v. Patterson, 58 Vt. 676.
Amy et al v. Watertown, 130 U. S. 301; 32 L. Ed. 946.
Harkness v. Hyde, 98 U. S. 476; 25 L. Ed. 237.
Connecticut Mutual Life Insurance Co. v. Spratley, 172 U. S. 602; 43 L. Ed. 569.

Alexandria v. Fairfax, 95 U. S. 774; 24 L. Ed. 583.
Bors v. Preston, 111 U. S. 252; 28 L. Ed. 419.
Andrews v. Michigan Central R. R. Co., 99 Mass. 534.
Desper et al v. Continental Water Meter Co., 137 Mass, 252.
Lewis v. Northern Railroad, 139 Mass. 294.
Mexican Central Railway Co. Ltd., v. Pinkney, 149 U. S. 194; 37 L. Ed. 699.

III.

The sufficiency of the service must be determined from the return of the marshal on the original writ, unaided by extraneous facts or presumptions.

Folsom v. Conner, 49 Vt. 4.
Hill v. Warren, 54 Vt. 73.
Clark & Freeman v. Patterson, 58 Vt. 676.
Alexandria v. Fairfax, 95 U. S. 774; 24 L. Ed. 583.
Mexican Central Railway Co. Ltd. v. Pinkney, 149 U. S. 194; 37 L. Ed. 699.
Bors v. Preston, 111 U. S. 252; 28 L. Ed. 419.
Johnson v. Hunter, 147 Fed. 133, 137-139.
Galpin v. Page, 18 Wallace 350, 366; 21 L. Ed. 959.
Settlemier v. Sullivan, 97 U. S. 445, 448; 24 L. Ed. 1110.
Cheeley v. Clayton, 110 U. S. 701, 708; 28 L. Ed. 298.

IV.

The insufficiency of the original writ is apparent on the face of the record; consequently, the insufficiency of said writ was properly raised by the motion to dismiss.

Writ, Tr. pp. 3-9, ff. 4-15.
Bent v. Bent, 43 Vt. 42.
Bennet v. Allen, 30 Vt. 684.

V.

The insufficiency of the attachment and service was properly raised by the motion to dismiss; also by the plea in abatement.

Motion to Dismiss, Tr. p. 14, f. 23.
Plea in Abatement, Tr. pp. 11-13, ff. 18-22.
Howard v. Walker, 39 Vt. 163.
Bliss v. Conn. & Pass. R. R. Co., 24 Vt. 428.
Bennet v. Allen, 30 Vt. 684.
Bent v. Bent, 43 Vt. 42.

VI.

The plea in abatement was sufficient in form and substance.

Plea in Abatement, Tr. pp. 11-13, ff. 18-22.
V. S. Secs. 1109, 3948, 3949.
Pearson v. French, 9 Vt. 349.
Morse v. Nash, 30 Vt. 76.
Fogg v. Blair, 139 U. S. 118, 127.
Kent v. Lake Superior Ship Canal, Railway & Iron Co., 144 U. S. 75, 91.

Hill v Warren, 54 Vt. 73.
Clark & Freeman v. Patterson, 58 Vt. 676.
Gould's Pleadings, Chap. 3, Sec. 167.
Stephen's Pleadings, p. 217.
1 Chitty's Pleadings, 13 Am. Ed. 611.
Carpenter et al v. Briggs et al, 15 Vt. 34, 41.
Murdock v. Hicks, 50 Vt. 683, 687.
Lyman v. Central Vt. Ry. Co. 59 Vt. 167, 175.
Clement v. Graham, 78 Vt. 290, 308.
Toland v. Sprague, 12 Peters 309, 335.
Galpin v. Page, 18 Wall. 350; 21 L. Ed. 959.

VII.

The replication to the plea in abatement was insufficient and alleged not facts, but legal conclusions not sustained by facts.

Replication, Tr. p. 16, f. 27.
Demurrer to Replication, Tr. p. 18, f. 32 *et seq.*

VIII.

The insufficiency of the original writ and service was properly raised on the record before the Circuit Court of Appeals for the Second Circuit.

Motion to Dismiss, Tr. p. 14, f. 23 *et seq.*
Plea in Abatement, Tr. p. 11, f. 18 *et seq.*
Replication, Tr. p. 16, f. 27.
Demurrer, Tr. p. 18, f. 32 *et seq.*
Assignment of Errors, 1-28, Tr. pp. 118-120, ff. 178-180.
Petition for Re-hearing, Tr. p. 133 *et seq.*, f. 205 *et seq.*

IX.

The Circuit Court of Appeals had jurisdiction to determine and it was its duty to determine the sufficiency of the original writ and service, because upon that depended the jurisdiction of both the Circuit Court and the Circuit Court of Appeals.

U. S. Statutes, Chap. 517, March 3, 1891; U. S. Comp. Stats. 1901, p. 549.

Louisville Trust Co., Receiver, etc. v. Knot, 191 U. S. 225.

Carter v. Roberts, 177 U. S. 496.

American Sugar Refining Co. v. City of New Orleans, 181 U. S. 277.

Grand Trunk Railway Co. v. Twitchell, 59 Fed. 727.

King v. McLean Asylum of Massachusetts General Hospital et al, 64 Fed. Rep. 325.

American Sugar Refining Co. v. Johnson, 60 Fed. 503.

Texas & Pacific R. R. Co. v. Bloom, 60 Fed. 979.

Sneed v. Sellers et al, 66 Fed. Rep. 371.

Coler v. Granger County et al, 74 Fed. Rep. 16.

Baltimore & Ohio R. R. Co. v. Meyers, 62 Fed. Rep. 367.

Rust v. United Water Works Co., 70 Fed. 129.

United States Freehold Land & Emigration Co. v. Gallegos et al, 89 Fed. 769.

McCord Lumber Co. et al v. Doyle, 97 Fed. 22.

Kreider et al v. Cole, 149 Fed. Rep. 647.

Jones v. Gould et al, 149 Fed. 153.
Jennings v. Johnson et al, 148 Fed. 337.
Scribner et al v. Straus et al; Charles Scribner's Son's v. same, 147 Fed. p. 28.

X.

The Circuit Court of Appeals cannot properly affirm a judgment rendered by a Circuit Court when it appears on the record that the Circuit Court had no jurisdiction of the original action nor of the defendant therein.

Kreider v. Cole, 149 Fed. Rep. 647, 649.
Ryder v. Holt, 128 U. S. 525; 32 L. Ed. 529.

ARGUMENT

I.

The original writ in the suit of John N. Gokey v. Boston & Maine Railroad, returnable to the United States Circuit Court for the District of Vermont, was insufficient.

Revised Statutes of the United States, Sec. 914, is as follows;

> "The practice pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule or court to the contrary notwithstanding."

Rule 7 of the United States Circuit Court for the District of Vermont is as follows:

> "The form of process and declaration shall be the same as *is or may be*, provided by the laws of this State, and in cases not expressly provided for by such laws, in the form used in the County and Supreme Courts of the State so far as they may be appliable to the Federal Courts." (Italics are ours)

Rule 8 of the United States Circuit Court for the District of Vermont, promulgated at the May term, 1885, provides that:

> "All process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof, according to the laws of this State, otherwise it shall be returnable to the next regular term thereafter; final process shall be returnable to the next regular term, or otherwise, if so specially ordered by a judge."

The Judiciary Act of the State of Vermont, of March, 1797, provided among other things, that:

> "Every writ or process issued against * * * corporation, shall be served, at least *thirty days* before the session of the court, to which the same is made returnable."

The Revised Statutes of 1839, Chapter 28, Sec. 10; the General Statutes of 1863, Chapter 33, Sec. 19 and the Revised Laws of 1880, Sec. 868, contain the same provision; and such continued to be the law of the State of Vermont until December 1, 1893, when Act No. 28 of the laws of 1892 took effect.

Vermont Statutes, Sec. 1088 (being Sec. 8 of No. 28 of 1892) Sec. 1089 (being Sec. 9 of No. 28 of 1892) and Sec. 1090 (being Sec. 1 of No. 44 of 1894) were the statutory requirements in Vermont regarding service and return of writs and the appearance of defendants in a suit, in force at the time the writ in this cause was issued and served. These sections are as follows:

> "Sec. 1088. Every writ and process returnable before the supreme or county courts, except as otherwise provided, shall be served within twenty-one days from the date of issuing the same, including the day of service, and excluding the day of

issuing, and shall contain the following direction to the officer, viz: 'Fail not but service and return make within twenty-one days from date hereof.' "

"Sec. 1089. The party suing out such process shall cause the same to be entered and docketed in the county clerk's office on or before the expiration of said twenty-one days, or the process shall on motion abate."

"Sec. 1090. The defendant shall cause his appearance therein to be entered with the clerk on or before the expiration of forty-two days from the date of such writ."

No. 137 of the Acts of the General Assembly of the State of Vermont, 1898, provides the form of a writ of attachment to be used in the courts of this state, as follows:

"STATE OF VERMONT, County, ss. { To any sheriff or constable in the state, or to , an indifferent person,

GREETING:

"By the authority of the state of Vermont, you are hereby commanded to attach the goods, chattels or estate of A. B., of....., in the county of....., to the value of.....dollars, and him notify thereof according to law; and also notify him to appear before the..... .....county court, at.....within and for the county of....., and also to notify.....to cause.....appearance herein, to be entered with the clerk of said court, on or before the expiration of forty-two days from the date hereof, then and there in said court to answer to C. D., of.....in the county of.....in

a plea of (here insert the declaration)." To the damage of the plaintiff..... dollars, for the recovery of which, with just costs, the plaintiff brings suit.

"Fail not, but service and return make within twenty-one days from the date hereof.

"Dated at....., in the county of.....the.....day of....., A. D.....

"E. F., clerk (justice of the peace or master in chancery.)

"G. H. recognized to the defendant in the sum of.....dollars, as surety for the costs of prosecution, as the law directs.

"Before me, E. F., clerk, (justice of the peace or master in chancery.")

Section 914 of the Revised Statutes of the United States provides that the form of writs returnable to the district and circuit courts shall conform to the form of writs in use in the state courts of their respective states.

Rule 7 of the United States Circuit Court, District of Vermont, is to the same effect and is imperative, and provides that "the form of process and declaration *shall be* the same as *is or may be*, *provided* by the laws of this state."

From the first of August, 1895, the statutes of Vermont have contained the provisions in Sections 1088, 1089 and 1090 of Vermont Statutes (*supra* p. 32, 33.)

Rule 8 of the United States Circuit Court for the District of Vermont (*supra* p. 32), provides that:

> "All process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term, *if there shall be time for seasonable service thereof, according to the laws of this state*, otherwise it shall be returnable to the next regular term thereafter." (Italics are ours.)

Under the statutes in force at the time this writ issued, "seasonable service" of said writ would mean at least twenty-one days prior to the first day of the term to which said writ was returnable, and it would mean, further, that the writ should have issued at least forty-two days before the opening day of the term, in order that there be "seasonable service" under the statutes of the State of Vermont.

We respectfully submit that rule 7 (*supra* p. 31) requires the form of a writ returnable to the United States Circuit Court for the District of Vermont to conform to the law of the State of Vermont at the time the writ issues, else there is no force in the expression "or may be" in the sentence "shall be the same as is or may be provided by the laws of this state."

Therefore, we respectfully submit that the writ in this case is not in conformity with United States statutes, Sec. 914 above quoted (*supra*, p. 31), nor with rules 7 and 8 of the United States Circuit Court for the District of Vermont, nor with the statutes of Vermont in force at the time said writ issued.

There is no pretence that these statutory provisions were complied with in the present case. The writ was dated and issued only twenty-two days before the term to which it was made returnable instead of forty-two days, as the rule and the Vermont Statutes require. It was served only fifteen days before the term to which it was made returnable. (Tr. p. 9, f. 15) instead of twenty-one days, as the rule and the Vermont Statutes require.

The statutory form of writs returnable to the county courts of Vermont in similar actions requires the defendant to appear within forty-two days from the date of

the writ, and not sooner (*supra* p. 33), consequently there was not time for "seasonable service" within the meaning of rule 8 and the Vermont Statutes to which that rule refers, at the time this writ issued so that said writ could properly be made returnable to the May term of said United States Circuit Court.

Under the provisions of said rule 8, it should have been made returnable to the next regular term thereafter, viz., the October term of said court, provided the latter part of the rule is to be given its plain meaning. It evidently was not the intent or purpose of the United States Circuit Court for the District of Vermont, when it promulgated this rule 8, to make the time of service before the return day of writs returnable to that court less than was then required or which thereafter might be required in the state courts. It was the evident intent of the rule to make the practice as to the time when writs should be returnable and the time of service conform to the state practice as it then was or might thereafter be.

An examination of the Judiciary Act of the State of Vermont of March, 1797 (*supra* p. 32) and the subsequent statutes relating to the matter of writs and service against corporations, shows that for nearly ninety-six years before and at the time this rule 8 was promulgated in 1885, the statutes of Vermont required a writ against a corporation to be served at least thirty days before the term of court to which the same was made returnable. This rule certainly cannot be construed to require a shorter notice to corporations than that which the laws of the state required at the time it was promulgated, unless a shorter notice should thereafter be prescribed by the laws of the state.

The construction of this rule must, we respectfully

submit, conform to one of two theories. It must either mean that the writ shall be so formulated as to conform to the law in force in the State of Vermont *at the time said rule was promulgated;* or that the writ must be made to conform to the statutes of the state *at the time the writ issues.*

If the first is to be taken as the basis of construction, then this rule, in conjunction with the statutes of the United States and of the State of Vermont, requires that said writ should be so formulated as to require the defendant in said writ to appear at some term of the United States Circuit Court for the District of Vermont to be held not earlier than thirty days from the date when said writ would be served; that is, said writ must be so formulated that there will be ample time between the time it issues and thirty days before the term to which it is returnable, for proper service to be made upon the defendant.

If the second is the correct basis of construction, then the writ should be dated at least forty-two days prior to the opening day of the term of said court to which it is returnable, and said writ should provide for service thereof within twenty-one days from its date and for a return of the writ within that time to the United States Circuit Court, and should require the defendant therein to appear in said court in answer to said writ within forty-two days from the date thereof.

Rule 8 of the Circuit Court does not prescribe any time for the return or service of a writ issued from said United States Circuit Court otherwise than by reference to the state law. There is no pretence that the original writ in this cause did conform to the state law either at the time the rule was promulgated or at the time the

writ issued. We therefore submit that said writ was not in accordance with the statutes of the State of Vermont, nor the rules of the United States Circuit Court for the District of Vermont, nor the statutes of the United States.

It cannot be assumed that under this rule 8, the length of time that each writ must be served before the term of court to which it is returnable and, consequently, the form of said writ, was intended to rest in the discretion of the judge of such court, to be exercised in each case after the writ was served and entered in court.

Certainly no such discretion is given the judge by the statutes of either the United States or the State of Vermont.

There never was a statute in Vermont nor any practice in Vermont under which this writ could be sustained if the writ had been returnable to a state court in Vermont.

The writ in this suit is in part as follows:

> "By the authority of the United States, you are hereby commanded to attach the goods, chattels or estate of the Boston & Maine Railroad, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, * * * to the value of fifteen thousand dollars, and it notify thereof according to law, and also notify it to appear before the Circuit Court of the Second Circuit of the United States, next to be holden at Windsor, within and for the said District, on the third Tuesday of May next, then and there to answer unto John N. Gokey * * * (Tr. p. 3, f. 5.)
>
> "And have you then there this writ, with your doings herein.
>
> "Witness, the Honorable Melville W. Fuller,

Chief Justice of the Supreme Court of the United States, at Burlington, in the District of Vermont, this 25th day of April, in the year of our Lord one thousand nine hundred and four, and of the independence of the United States the one hundred and twenty-eighth.

(Seal) GEO. E. JOHNSON, Clerk."

(Tr. p. 9, ff. 14-15).

It is to be noted that this writ requires the defendant to appear at a term of court to be holden on the third Tuesday of May, 1904, which was the 17th day of May, twenty-two days from the date of said writ. No form of writ has ever been in use in the state courts of Vermont, and no form of writ is prescribed or ever has been prescibed by the statutes of the State of Vermont which required a defendant corporation to enter an appearance in a suit against it within twenty-two days from the date of the writ.

We respectfully submit that an examination of the writ in the original action, the statutes of the United States and of the State of Vermont in conjunction with the rules of the Circuit Court of the United States for the District of Vermont makes it conclusive that the writ in the original action herein did not conform to the requirements of the law and was insufficient to give the Circuit Court for the District of Vermont jurisdiction of the action attempted to be instituted thereby or of the defendant therein named.

II.

The Boston & Maine Railroad, being a foreign corporation and a non-resident of Vermont, the Circuit Court could not acquire jurisdiction of the original action, nor of this petitioner, the defendant therein, except by a valid attachment of property of this petitioner in Vermont and a legal service of the original writ in accordance with the laws of the State of Vermont. No such service nor attachment was made and the Circuit Court for the District of Vermont acquired no jurisdiction of the original action or of the defendant therein, the petitioner here.

The statutes material to this issue in force in the State of Vermont at the time this writ issued and was served, are the following.

The only provision of the statutes of Vermont which authorizes a foreign corporation to operate a railroad in Vermont, is Vermont Statutes, Sec. 3747, as follows:

> "Sec. 3747. Railroad companies in this state may make contracts and arrangements with each other, and with railroad corporations incorporated under the laws of other of the United States, or under the authority of the Dominion of Canada, for leasing and running the roads of the respective corporations, or a part thereof, by either of their respective companies; and may contract for and hold in fee-simple or ortherwise, lands or buildings in this or other states for depot purposes and storing freight; and may purchase and hold such personal property as is necessary and convenient for carrying into effect the object of this section."

The statutes relating to the service of process on non-resident lessees of railroads in Vermont, are Sections 3948 and 3949 Vermont Statutes, as follows:

"Sec. 3948. The trustees under an assignment, mortgage, or other transfer, executed by a railroad company, and the lessees of the railroad company not resident in the state, who hold possession of the property of such railroad company, or manage the running of its road, under such assignment, mortgage, lease, or other transfer, shall, if they reside without the state, appoint a person resident in the state, upon whom service of process may be made; and shall, in the month of January, annually, file in the office of the clerk of the county court in each county through which the road passes, a certificate signed by such trustees or lessees, designating the name and residence of the person thus appointed."

"Sec. 3949. Service of process upon such person shall be a legal service on such trustees or lessees; and if the trustees or lessees do not appoint such agent, and file such certificate, service may be made by leaving a copy of the process with a station agent, or depot master, in the employment of such trustees or lessees, and the same shall be legal service of such process upon such trustees or lessees."

The statuatory provisions in Vermont relating to attachments are, Vermont Statutes, Sections 1104, 1109:

"Sec. 1104. The officer making attachment of personal property by lodging a copy in a town or county clerk's office, shall forthwith notify the defendant of the attachment, personally, or by leaving a written notice at his last and usual place of abode, or by leaving such notice with the person having the care of the property; and the officer shall state in his return the manner of giving such notice."

"Sec. 1109. When the goods or chattels of a person are attached at the suit of another, a copy of the attachment and list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, as directed in the service of summons, and if such person is not an inhabitant of the state, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached; and the delivery of such copy shall be certified by a sworn officer who served the attachment, or by the affidavit of a disinterested person who delivered the same."

The only service attempted to be made of this writ is that shown by the officer's return which is as follows:

"UNITED STATES OF AMERICA,

District of Vermont, ss:

"At Lyndon, in said District, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within defendant The Boston & Maine Railroad Company its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. &. M. R. R. Co. by H. E. Folsom, one of its accredited agents, and a division Superintendent within said district. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and superintendent aforesaid, at his office at Lyndonville, in said District, with my doings thereon endorsed.

Attest: HORACE W. BAILEY,

United States Marshal."

(Tr. p. 9. f. 15)

The United States Revised Statutes, Sec. 914, and rules 7 and 8 of the Circuit Court for the District of

Vermont provide that the *practice* and pleadings and forms and *modes of proceeding* in civil causes shall conform to the state practice in this regard (*supra*, pp. 31, 32.)

Under these statutes and rules, the mode of making service of process issuing from the United States Circuit Court and of acquiring jurisdiction by said court is governed by the State law.

Amy et al v. Watertown, 130 U. S. 301; 32 L. Ed. 946.

Harkness v. Hyde, 98 U. S. 476; 25 L. Ed. 237.

Mexican Central Railway Co. Ltd. v. Pinkney, 149 U. S. 194; 37 L. Ed. 699.

Connecticut Mutual Life Insurance Co. v. Spratley, 172 U. S. 602; 43 L. Ed. 569.

The court below had no discretion in determining whether the service was sufficient. It could not adjudge that the service was sufficient at common law, or equitably, or morally. The question must be determined upon the face of the return, tested by the Vermont Statutes, which the United States courts are by statute bound to follow.

In *Amy et al v. Watertown*, 130 U. S. 301; 32 L. Ed. 946, the Court say (p.):

> "The principal question in this case is, whether the defendant, the City of Watertown, was served with process in the suit so as to give the court below jurisdiction over it. In order to understand the bearing of the facts of the case, it will be necessary to give a brief abstract of the laws of Wisconsin which relate to it, and these are mostly to be found in the charter of the City of Watertown and the Acts supplementary thereto. The state laws are referred to *because they govern the practice of the*

federal courts in the matter under consideration." (Italics are ours.)

The opinion then quotes Sec. 914 of the Revised Statutes of the United States and continues (p.):

> "Were it not for this statute, the circuit courts themselves could prescribe, by general rule, the mode of serving process on corporations as well as on other persons."

The opinion then cities various provisions of the local law which provides that a writ against the City of Watertown should be served upon the mayor. The opinion then continues (p.):

> "The service upon Rohr, the last mayor, therefore, was of no force, and had no effect whatever. The same thing may be said of the service on Baxter, the last presiding officer of the board of street commissioners.
>
> "The question, then, is reduced to this: Whether, in case the mayor has resigned and there is no presiding officer of the board of street commissioners (a body which seems to take the place of the common council of the city for many purposes), service of prossess on the city clerk and on a conspicious member of the board is sufficient. If the common law (which is common reason in matters of justice) were permitted to prevail there would be no difficulty. In the absence of any head officer, the court could direct service to be made on such official persons as it might deem sufficient. But when a statute intervenes and displaces the common law, we are brought to a question of words and are bound to take the words of the statute as law. The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations."

Later the opinion quotes from a Wisconsin case (p.):

"'When the statute prescribes a particular mode of service, that mode must be followed. *Ita lex scripta est.* There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations. When the statute designates a particular officer to whom the process may be delivered and with whom it may be left, as service upon the corporation, no other officer or person can be substituted in his place. The designation of one particular officer upon whom service may be made excludes all others. The temporary inconvenience arising from a vacancy in the office of mayor affords no good reason for a substitution of some other officer in his place, upon whom service could be made, by unwarrantable construction not contemplated by the statute.'

"It is unnecessary to look farther to see what the law of Wisconsin is on this subject. It is perfectly clear that by that law the service of process in the present case was ineffective and void."

The opinion concludes thus (p.):

"Here we are bound by statute; and not by the state statute alone, but by the Act of Congress, which obliges us to follow the state statute and state practice. The federal courts are bound hand and foot, and are compelled and obliged by the Federal Legislature to obey the state law; and according to this law *the judgment of the circuit court was correct and is therefore affirmed.*"

In Connecticut Mutual Life Insurance Co. v. Spratley, 172 U. S. 602; 43 L. Ed. 569, this court discusses the question of service of process upon a foreign corporation. In that case it is held that the service which was there shown was sufficient, but in the course of the dis-

cussion many suggestions occur corroborating our position in this case, that where the state statute prescribes a method of service, which gives a reasonable opportunity to acquire jurisdiction of the non-resident corporation, the provisions of that statute must be strictly followed. On page 610 this Court say:

> "In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the State. (Citing cases.) And if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law *an agent to receive such process in behalf of the corporation.*" (Italics are ours.)

And on page 619:

> "If by the statute of the state provision were made for the appointment of an agent by the company, upon whom process might be served, and the company had appointed such an agent, and there was no other statute authorizing service of process upon an agent of the company other than the one so appointed, we do not say that service upon any other agent of the company would be good."

By the Vermont Statutes, Sections 3948, 3949, it is provided that service may be made upon such corporations as this petitioner by delivering copies of the process to station agents or depot masters, provided no agent had been appointed upon whom service should be made of process against such corporations as provided in those sections. We submit that under these statutes, service upon a station agent or depot master is the exclusive method of making service upon this petitioner,

a non-resident lessee of a railroad in Vermont, when no agent for that purpose has been appointed.

In another case before this court, the question of service upon the Mexican Central Railroad under the statutes of Texas was involved. This statute provided for service on various officers and agents of foreign corporations and, among others, "upon any local agent within this state." It was held that one is not a local agent of a railroad company within the meaning of the Texas statute relating to the service of process upon foreign corporations, simply because the company paid one-half the expense incurred in the maintenance and operation of the joint warehouse in which he was employed.

Mexican Central Railway Co., Ltd., v. Pinkney, 149 U. S. 194; 37 L. Ed. 699.

In the opinion the Court say (p. 209):

> "In Harkness v. Hyde, 98 U. S. 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits. * * * * In the present case, when it was established by the facts stated in the plea in abatement, and admitted by the demurrer thereto, that the plaintiff in error was never brought before the court by any proper or legal process, the circuit court was without jurisdiction to proceed in the case; and in so doing, and in assuming jurisdiction and proceeding to trial on the merits, its action was erroneous."

In Alexandria v. Fairfax, 95 U. S. 774; 24 L. Ed.

583, the question was, whether service on the City of Alexandria, Va. was sufficient. In the opinion this Court say (p.):

> "But we are relieved from any difficulty on this subject by the State Statute of Virginia, which prescribes, as all state laws should do under which corporations are organized, the mode of serving process or notice on those corporations. This statute points out the officers of the corporation on whom such process or notice *may* be served, and is so liberal in providing for service as to leave no excuse for a departure from it by service on any one else. 'It shall be sufficient to serve any process against or notice to a corporation on its mayor, rector, president, or other chief officer, or, in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation against or to which the process or notice is, if it be a city or town, on the President of the Council or Board of Trustees, or in his absence, on the recorder, or any alderman or trustee.' Code of Virginia of 1860, p. 707, ch. 170, sec. 7."

In this case service was made on the auditor of the corporation of Alexandria and not on any of the officers or persons named in the statute. This Court further discussing the question, say (p.):

> "It appears from the bonds or certificates of debt in these cases that there was a Mayor of the City. On him, if in the City, the law required service to be made. There is no return that he was absent, or any reason given why service was not made on him. There was, as it appears, a Council, and a President of that Council, and he is specially named in the statute as an officer on whom service may be made. No reason is given why service was not made on him.
>
> "But if we could indulge in presumptions in

favor of this jurisdiction, which would be against all sound principle, and suppose that both these officers were absent, it should have been served on an alderman or councilman, since it appears there were aldermen or councilmen.

"We are not informed whether there was a recorder to that City. If there was, he was not served. But, by a strange fatuity, almost the only officer not mentioned in the statute as one on whom the service may be made, is the one selected, while all those are omitted whom the law specifically points out as the proper ones, of whom there were several; and for whose omission in the matter of service no reason is given."

It appears by the description of the petitioner, defendant in the original writ, that the Boston & Maine Railroad is a corporation created, organized and existing under and by virtue of the laws of Massachusetts (Tr. p. 3, f. 5). It further appears by the declaration that said Boston & Maine Railroad "upon and at the time of committing the grievances hereinafter mentioned operated and maintained a certain railroad and the appurtenances thereto belonging, to wit, at Lyndon, in the County of Caledonia, and District of Vermont." (Tr. p. 4, f. 5; p. 4, f. 7; p. 5, f. 9; p. 7, f. 11.)

There is no statute in Vermont except Vermont statutes, Sec. 3747 (*supra* p. 40) authorizing a foreign corporation to operate a railroad in this state.

We respectfully submit and insist that the Boston & Maine Railroad, at the time of the accident involved in this suit, as appears by the original writ and declaration, and Vermont Statutes Sec. 3747, was and still is a non-resident lessee of the railroad which it was then operating and maintaining in Vermont. It also appears by the plea in abatement (Tr. p. 11, ff. 18 & 19) that

at the time said writ issued and was served, said Boston & Maine Railroad was operating a railroad in Vermont as a non-resident lessee thereof and not otherwise, which fact is not denied by the replication to said plea (Tr. p. 16, f. 27.)

Therefore, the only proper mode of service of the writ upon the Boston & Maine Railroad is one of the methods prescribed by Vermont Statutes, Sec. 3949 (*supra* p. 41); in other words, the provisions in Sections 3948 and 3949 of Vermont Statutes for the service of process upon the lessee of a railroad not resident in the State of Vermont are *exclusive*. The fact that the lessee had "one of its offices for the transaction of its business" in Vermont, does not in any way change or enlarge the manner in which a writ may be served upon a defendant corporation which is such non-resident lessee.

We submit that the service attempted in this case by leaving a copy with "H. E. Folsom, agent and superintendent," is void. He is not one of the persons designated by the Vermont Statutes as an agent upon whom service can be made.

To acquire jurisdiction of a non-resident, it is necessary, first, to acquire a lien on the property of the defendant and, second, that proper notice of the suit be given such defendant.

In an action in Massachusetts against a railroad corporation, established in the State of Michigan, the only service of the writ was upon the treasurer of the corporation at its office in Boston, Mass. There was no attachment of property. The return alleged that the corporation had its usual place of business within the commonwealth. The Court say (p. 535):

"We are aware of no authority for the maintenance of such an action; and none has been found by the diligence of the learned counsel for the plaintiff. On the contrary, the numerous cases cited for the defendant fully support the opposite conclusion. A foreign corporation can only be sued in this Commonwealth by means of an attachment of its property; unless, as in the case of foreign insurance companies, by virtue of an express statute provision. The motion to dismiss was rightly allowed."

Andrews v. Michigan Central R. R. Co., 99 Mass. 534.

Desper et al v. Continental Water Meter Co. 137 Mass. 252.

Lewis v. Northern Railroad, 139 Mass. 294.

In the case at bar no valid attachment was made under the laws of Vermont, no lien on the engines mentioned in the return was acquired and no valid service of the writ was made upon this petitioner, defendant in the original action, under the laws of Vermont.

The requirements of the Vermont Statutes relative to attachments and the service of process on corporations in cases like this are contained in Sections 1104, 1109, 3948 and 3949 (supra p. 41-42)

These statutes require that the officer making an attachment of personal property shall forthwith notify the defendant by leaving a written notice with him or with the person having the care of the property; and the officer shall state in his return the manner of giving such notice, and shall also deliver to the party whose goods or chattels are so attached, a list of the property so attached, or if the person is a non-resident, such copy shall be left with his known agent or attorney, and for

want thereof, at the place where such goods or chattels were attached and the delivery certified by the officer who served the attachment.

In the case of a foreign corporation which is a non-resident lessee of a railroad in Vermont, the service of the notice and a list of property attached must be served upon a person on whom service of process is authorized by the corporation to be made, or on a station agent or depot master. The method of service of the writ, of the notice and of the list of property attached, and the persons on whom such service may be made, is provided by statute. That statute must be followed or the service is void.

The officer's return is the evidence of the service and plaintiff is bound by that return. If the return shows that the officer gave the notice and list of property attached to a person acting in one capacity and the service shown by the return is bad, it cannot be sustained by showing that such person on whom service was made held some other relation to the corporation, a non-resident lessee, not shown by the return, such that, had the service been made on such person in that capacity, the service would have been good.

The delivery of the notice and list of property attached and the return are all essential to the validity of an attachment in Vermont.

Vermont Statutes, Sec. 1104.

Clark & Freeman v. Patterson, 58 Vt. 676.

In this case the Court say (p. 679):

"An attachment is not complete and perfect until the officer's return is made. An officer may seize and hold personal property until the return day, but unless he make a proper statement of it in

writing on the writ and complete the service as required by the statute, it cannot be deemed an attachment.

"An attachment of property is a method prescribed by statute for creating a lien upon the debtor's property, without his consent, to respond to the exigency of the writ and to satisfy the judgment that may be obtained against him. To constitute a valid lien upon property by an attachment all the requirements of the statute in making it must be strictly followed. It is a general principle that any failure to comply with what is enacted as necessary to be done by the officer in making an attachment, must be held to be fatal to any lien attempted to be acquired thereby. Sumner v. Sherman, 13 Vt. 609.

"The same principle applies in a proceeding for acquiring a *lien* upon property by virtue of a statute without the consent of the owner, as governs in a proceeding for acquiring *title* to property under the provision of a statute without the consent of the owner.

"Sec. 881, R. L. (V. S. 1109) requires that 'a copy of the attachment and list of articles attached, attested by the officer serving the same, shall be delivered to the party whose goods and chattels are so attached,' etc.

"The official attestation of the attachment and list of articles attached, and the official certification in the officer's return on the writ, are essential parts of the service to make a valid attachment. Without this the service is essentially defective. Swetland v. Stevens, 6 Vt. 577."

In Hill v. Warren, 54 Vt. 73, service of the writ in the original case was attempted to be made on a defendant, alleged in the writ to reside out of the State of Vermont, at Concord, in the State of New Hampshire. The return was as follows (p. 76):

"STATE OF VERMONT, } At Waterbury, in said Washington Co., ss. } County, this 30th day of January, 1880, I then served this writ on the within named defendants by attaching the property of J. R. Hill, G. H. Emery and Josiah G. Dwight, 14 sides of harness leather, and on the same day I left with George Jackman, freight agent, where I attached the property, for the defendants, a true and attested copy of the original writ with my return hereon thereon endorsed."

The statute under which this attachment was made was R. L. 881, now V. S. 1109 (*supra* p. 42).

Judgment was rendered for defendant, (plaintiff in original action) and this was an action of Audita Querela to vacate that judgment on the ground that the service was so defective that the court obtained no jurisdiction.

The supreme court of Vermont in disposing of the question use the following language (p. 77):

"The return shows no reason for serving the writ in the method adopted. It does not show that the defendants were not within the precinct, nor that they had no known agent or attorney in the State. The methods of service provided are not alternative, but successive, the latter being proper only from necessity in default of ability to adopt the former. The court cannot presume the necessity; but the return must show it in order to render the service valid.

"Under that provision for leaving a copy where the goods were attached it might be proper to leave the copy with an individual; but the propriety of it must be shown in the return. As before stated this statute is entitled to a strict construction. It provides for a preceeding *in invitum*.

This return does not show in what relation Jackman stood to the property attached, or why a copy should be left with him. So far as appears from the return, *which could be the only guide of the court in deciding upon the validity of the service*, there was no more propriety in leaving a copy with Jackman than there would have been in leaving it with any person who happened to be there near the property at the time of the attachment. It would hardly be claimed that the legislature intended that such a service should be sufficient, or that a construction should be adopted that would make fraud quite so easy." And on p. 76:

"This statute provides a method of service against non-residents if they have property in this State; but it is not available unless strictly followed; and its construction should be such, within the proper scope of construction, as will secure fair dealing and be most likely to give notice of the proceeding. If the defendants had been residents or within the precinct at the time, they would each have been entitled to a copy of the attachment and list of the articles attached. Smilie v. Runnels et al., 1 Vt. 148. We think the reason is quite as strong, where service cannot be made upon the defendants in person, for leaving as many copies where the goods are attached. The reason for notice in all cases is equal; and the statute imports no design that the defendants shall not have notice in any case. Its object was to provide for the emergency of the defendants being out of the jurisdiction, but with guards to fairly protect them. We think it is plain that if the defendants had had a known agent in this State, they would have each been entitled to have had a copy left with him. It would be very strange that the legislature should intentionally provide that one copy served upon an agent of several absent defendants should be sufficient, when the law would have required a copy

served on each if they had been in the jurisdiction. Yet the statute plainly imports that there shall be as many copies left where the goods are attached in case there is no known agent, as would be required to be left with an agent. The language is: 'and if such person is not an inhabitant of the State, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached.' This construction and view is strongly supported by the case of Washburn v. N. Y. & Vt. M. Co., 41 Vt. 50, which was an attachment of real estate under section 874, R. L., by lodging a copy in the town clerk's office, and where it was held than an additional copy must be left for the absent defendant."

To the same effect is *Folsom v. Conner*, 49 Vt. 4.

In this case the copy was left with a son of the defendant who was in possession of the property attached, but the return showed the copy to be left with the son at his home. Judgment was rendered for plaintiff.

This was also Audita Querela to vacate the judgment because the service was not sufficient to give the court jurisdiction.

The Court in disposing of this question (p. 6) use the following language.

> "When the suit before the justice was brought against this complainant, he had ceased to be a resident of the state, and had no place of abode, and no known agent, within it, in the sense of the law as to the service of process; and had no agent of any kind, for any purpose, except that he had specially authorized his son to let Durgin (Pltff. in original action) take a certain wagon and harness, if he would receive them in full satisfaction of the debt which this plaintiff owed him, it being the debt on which the judgment now in question is grounded."

And on page 7:

"The facts proved show that no such service was made by attachment and the leaving of copy, as is required by the statute, in order to put the suit on foot so as to place this plaintiff in any subjection to the proceeding in any stage or event of it."

The statute applicable to the case must be strictly followed in all actions against absent defendants.

Rollins v. Clement, 49 Vt. 98.

The return on the original writ in the case at bar shows that the writ was served (Tr. p. 9, f. 15).

"By attaching as the property of the within defendant The Boston & Maine Railroad *Company* its locomotive engines numbered 650 and 651, the same being designated to me (the officer) as the property of the said B. & M. R. R. *Co.*, by H. E. Folsom, one of its accredited agents, and a division superintendent within said District. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and superintendent aforesaid, at his office at Lyndonville, in said District, with my doings thereon endorsed.

Attest: HORACE W. BAILEY,
United States Marshall."

There is nothing in this return which states or from which the inference is necessarily drawn, that the engines attempted to be attached were in H. E. Folsom's care. It does not appear that they were in his office, and if he was a superintendent, it is not a violent presumption to suppose that they were not.

Any other person could have pointed out these engines as the property of the Boston & Maine Railroad Company as well as Mr. Folsom. They were probably

labelled. If the Boston & Maine Railroad had appointed an agent upon whom service could be made under the statute V. S. Sec. 3948, then that agent was the only person on whom to serve the writ in this case. It does not appear by the return that such agent was not duly appointed by the Boston & Maine Railroad. It does not appear that Folsom was such agent. Service was not made on him as such agent.

If the Boston & Maine Railroad had designated no one on whom service could be made as provided by the statute, then "a station agent or depot master" was the only proper person on whom to serve the writ. It does not appear by the return that Folsom was either a station agent or depot master, and service was not made on him as such. It does not appear by the return that the Boston & Maine Railroad had no "station agent or depot master" in Vermont. It appears by the plea in abatement that said railroad had twenty-five station agents or depot masters, and such fact is not denied by the replication.

If the Boston & Maine Railroad had not appointed an agent on whom service could be made as provided by statute, and had no station agent or depot master in Vermont, and if there was some person in whose custody the property was when attached, then service of the notice of the attachment, the list of the property attached and the writ could have been made on the person having the custody of said property or on the known agent or attorney of the defendant, provided the statutory requirements in regard to such service had been followed in other respects, but they were not.

It does not appear by the return that the Boston & Maine Railroad did not have an agent appointed upon

whom service could be made, nor that it did not have station agents and depot masters. It does not appear that Folsom was the custodian of the property attempted to be attached, nor that he was the known agent or attorney of the defendant.

It does not appear by the return that the officer who served the writ left a copy of the attachment and list of the articles attached with Folsom or any other person *for the defendant.*

It is essential to the validity of the service, even if Folsom had been a proper person upon whom to make service, that a notice of the attachment, list of the articles attached and a copy of the writ should have been left with him *for the defendant.* It is material to the validity of the service that the copies be so left and that such fact be alleged in the return.

Vermont Statutes, Sec. 1104, 1109 (*supra* pp. 41, 42.)

Hill v. Warren, 54 Vt. 73.

Clark & Freeman v. Patterson, 58 Vt. 676.

We submit that it is not every agent of a non-resident with whom a copy of the attachment and a list of the articles attached may be left, but only the agent who has to do with the property as custodian or caretaker thereof or some agent designated by the statutes. We further submit that "one of its accredited agents and a division superintendent" is not a "known agent or attorney" within the meaning of this statute.

The return shows no reason why service was not made on some of the agents of the corporation on whom the statute authorized service. There is no presumption that such agents did not exist, as it affirmatively appears that the corporation was doing business and operating a railroad in Vermont.

It affirmatively appears by the plea in abatement and is not denied by the replication, that the Boston & Maine Railroad had not appointed an agent on whom service could be made, and that it had station agents and depot masters in Vermont. These facts appearing on the record, no presumption can be made to sustain the jurisdiction contrary to these averments.

The United States Circuit Court is a court of limited jurisdiction, and no presumption can be made to give it jurisdiction. Its jurisdiction must appear on the face of the record.

Bors v. Preston, 111 U. S. 252; 28 L. Ed. 419.

The only service that was attempted to be made is that shown by the return (Tr. p. 9, f. 15). No other or different service is claimed to have been made or attempted.

There is nothing in the return that can reasonably be construed to mean that service was made on H. E. Folsom as the person in charge of or having the care or custody of the property attached.

If the court below acquired jurisdiction in this case, it is because the attachment attempted to be made was a valid attachment and the service of the writ was made in accordance with the statutory provisions of Vermont governing the same, and the validity of both must appear upon the return. We submit that the attempted service was void; that the Circuit Court acquired no jurisdiction.

The Circuit Court had no jurisdiction of this action, except on the ground of the diversity of citizenship of the parties to the action. In addition to proper averments in the writ, proper service of the writ is necessary to give jurisdiction.

Mexican Central Ry. Co., Ltd. v. Pinckney, 149 U. S. 194; 37 L. Ed. 699.

No presumptions will be made for the purpose of helping out the service and sustaining the jurisdiction.

Alexandria v. Fairfax, 95 U. S. 774; 24 L. Ed. 583.

Bors v. Preston, 111 U. S. 252; 28 L. Ed. 419.

If the court had the lawful right to supply, by presumption, any of the facts necessary to support this service, it certainly would not make so absurd a presumption of fact as to presume that these two locomotive engines, at the time of their attachment, were in fact in the office of H. E. Folsom, Superintendent of the defendant.

The defendant is the *Boston & Maine Railroad* (Tr. p. 3, f. 5). It is not the *Boston & Maine Railroad Company* nor the *Boston & Maine Railroad corporation*. The Marshal did not attach nor attempt to attach any property of the defendant, the Boston & Maine Railroad. What he attempted to attach, was the property of a corporation or company which he describes as the "Boston & Maine Railroad Company", which we submit is an entirely different entity from the defendant named in the writ.

Later in his return he says, describing what he attempted to attach:

> "the same being designated to me as the property of the said B. & M. R. R. Co. by H. E. Folsom, one of its accredited agents, and a division superintendent within said District."

This is a direct averment that the engines he attached were pointed out to him as the property of an en-

tity entirely different from the defendant in the suit, and by a person whom the return alleges to be the accredited agent of an entity other than the defendant. Nothing can be inferred from the further language of the return in describing H. E. Folsom "and *a division superintendent* within said District." Superintendent of what? Superintendent for whom?

Certainly this return does not show him to have been then a superintendent of the defendant in this suit nor a superintendent of any railroad nor of any locomotive engines.

The most that can be reasonably claimed for this return is, that the Marshal attached two engines, the property of an entity other than the defendant and gave a copy of the writ to an accredited agent of that other entity, the B. & M. R. R. Co. (Tr. p. 9, f. 15).

We submit that the record shows no proper or sufficient service of the original writ and that the Circuit Court was without jurisdiction.

III.

The sufficiency of the service must be determined from the return of the marshal on the original writ, unaided by extraneous facts or presumptions.

In Hill v. Warren, 54 Vt. 73, the service of the writ was in question: and in the opinion (p. 77) the Court say:

> "This return does not show in what relation Jackman stood to the property attached, or why a copy should be left with him. So far as appears from the return, *which could be the only guide of the court in deciding upon the validity of the service*, there was no more propriety in leaving a copy with Jackman than there would have been in leaving it with any person who happened to be there near the property at the time of the attachment."

Folsom v. Connor, 49 Vt. 4.

In *Clark & Freeman v. Patterson*, 58 Vt. 676, the Court say (p. 679):

> "An attachment is not complete and perfect until the officer's return is made. **** It is a general principle that any failure to comply with what is enacted as necessary to be done by the officer in making an attachment, must be held to be fatal to any lien attempted to be acquired thereby. Sumner v. Sherman, 13 Vt. 609. *** The official attestation of the attachment and list of articles attached, and the official certification in the officer's return on the writ, are essential parts of the service to make a valid attachment. Without this the service is essentially defective. Swetland v. Stevens, 6 Vt. 577."

The service must stand on the return. No presumptions will be made for the purpose of helping out the service and sustaining jurisdiction.

Alexandria v. Fairfax, 95 U. S. 774; 24 L. Ed. 583.

Bors v. Preston, 111 U. S. 252; 28 L. Ed. 419.

In the opinion in *Alexandria v. Fairfax*, the Court say:

> "But if we could indulge in presumptions in favor of this jurisdiction, *which would be against all sound principle*, and suppose that both these officers were absent, it should have been served on an alderman or councilman, since it appears there were aldermen or councilmen." (Italics are ours.)

Johnson v. Hunter, 147 Fed. 133, 137-139.

Galpin v. Page, 18 Wall. 350, 366; 21 L. Ed. 959.

Settlemier v. Sullivan, 97 U. S. 444, 448; 24 L. Ed. 1110.

Cheely v. Clayton, 110 U. S. 701, 708; 28 L. Ed. 298.

IV.

The insufficiency of the original writ is apparent on the face of the record, consequently the insufficiency of said writ was properly raised by the motion to dismiss.

It is the well settled practice in Vermont, and, we believe, in all the states, that any defect in the process or in the service which is apparent upon the record may properly be raised by a motion to dismiss.

Bent v. Bent, 43 Vt. 42.

Bennett et al v. Allen, 30 Vt. 684.

V.

The insufficiency of the attachment and service was properly raised by the motion to dismiss; also by the plea in abatement.

Certain defects in the service were apparent on the face of the return. It was apparent on the face of the return that the time of service did not comply with the requirements of the statutes of the United States and the State of Vermont, or the rules of the Circuit Court for the District of Vermont. It was apparent on the face of the return that the attachment did not comply with the requirements of the Vermont Statutes, in that the return did not show that any copy of the attachment or list of the articles attached was given to the defendant or to anyone *for the defendant*. It was apparent from the return that no service had been made sufficient to give the court jurisdiction of the action, or of the defendant therein, the petitioner here.

We submit further, that it was apparent from the record that the service of the writ did not comply with the requirements of the statute as to service upon non-resident lessees of a railroad in Vermont, in that the return did not show that any copy of the writ was given to a person appointed by the defendant upon whom service could be made as provided by statute, nor upon any station agent or depot master of the defendant, each of which defects in the service was pointed out by the motion to dismiss (Tr. pp. 14-15, ff. 24-26).

In so far as the defects in service were clearly apparent on the face of the record, they were shown by the plea in abatement (Tr. p. 11).

That defects in the service may be raised by a mo-

tion to dismiss or by a plea in abatement, is elementary.

Bliss v. Conn. & Pass. R. R. Co., 24 Vt. 428.
Howard v. Walker, 39 Vt. 163.
Bennett v. Allen, 30 Vt. 684.
Bent v. Bent, 43 Vt. 42.

VI.

The plea in abatement was sufficient in form and substance.

The defendant plead in abatement that the Boston & Maine Railroad was a corporation organized under the laws of the Commonwealth of Massachusetts and a resident of Massachusetts; that as lessee and not otherwise it operated the Connecticut & Passumpsic Rivers Railroad in Vermont; that it had twenty-five station agents and depot masters in Vermont at the time the said writ was attempted to be served; that it had no person residing in Vermont on whom it had authorized service of process issued against it to be made under the provisions of Vermont Statutes 3948-3949; that no service of said writ was made except as shown by the return; that H. E. Folsom, on whom service was attempted to be made, was not a person residing in Vermont on whom defendant had authorized service of process issued against it to be made; that he was not a "station agent" nor "depot master;" that defendant had not accepted service of said writ; that no copy of said writ, no notice of said attachment, no list of the articles attached, attested by the officer serving said writ, was ever delivered to the defendant, nor to any person residing in the State of Vermont, appointed by defendant as a person upon whom service of process against this defendant might be made, nor to any "station agent" nor to any "depot master" in the employment of this defendant (Tr. pp. 11-13).

To this plea plaintiff replied that

> "H. E. Folsom was, on the day of the service of the original writ in this cause, to wit, on the 2nd day of May, 1904, a person residing within the State of Vermont upon whom service of pro-

cess issued against this defendant might be legally made, to wit, an agent of this defendant" (Tr. p. 16, f. 27).

To this replication defendant demurred specially, assigning as grounds of demurrer, that said replication traversed no averments of the plea, confessed and avoided none, averred only a legal conclusion, stated no material traversable facts showing that H. E. Folsom was an agent on whom process issued against defendant could or might be legally served (Tr. pp. 18-19, ff. 31-33).

A demurrer does not admit the accuracy of the adversary's legal conclusions; it admits only facts well pleaded.

Fogg v. Blair, 139 U. S. 118, 127; 35 L. Ed. 104.

Kent v. Lake Superior Ship Canal, Ry. & Iron Co., 144 U. S. 75, 91; 36 L. Ed. 352.

The plea was sufficient. It set forth all the facts necessary to show that the service shown by the return was not good and denied any service or attempted service except that shown by the return.

Pearson v. French, 9 Vt. 349.

Morse v. Nash, 30 Vt. 76.

In the preceding part of this brief, we have endeavored to show that the writ and the service was insufficient; that the return is the conclusive evidence of what was done in making or attempting to make service of the original process; and that a plea in abatement is a proper method of raising the insufficiency of the service.

The return (*supra* p. 7) shows just what was done by the Marshal in attempting to serve the original pro-

cess in this suit and said return is set forth in the plea in abatement.

(*a*) The plea in abatement states what service was made, sets out the return and alleges that no other service was made or attempted to be made (Tr. p. 12, f. 20 *et seq*; p. 13, f. 22).

(*b*) It alleges that defendant in that suit (petitioner here) was a non-resident lessee of the railroad on which plaintiff therein was injured, and had a large number, to wit, twenty-five "station agents and depot masters" within the State of Vermont (Tr. p. 11, f. 18 *et seq.*).

(*c*) It alleges that the defendant in that suit had not appointed an agent resident in Vermont upon whom service of process could be made as provided in Vermont Statutes 3948 (Tr. p. 12, f. 19 *et seq.*).

(*d*) It alleges that H. E. Folsom, the person upon whom service was attempted to be made and to whom the copy was delivered, was not then a person residing in Vermont authorized by the defendant as a person upon whom service of process against said defendant might be made, and was not a station agent or depot master of defendant (Tr. p. 13, f. 21 *et seq.*).

(*e*) That no copy of said writ, no notice of said attachment, no list of the articles attached by the officer serving said writ was ever delivered to the defendant or to any person appointed by defendant as a person upon whom service of process might be made, nor to any station agent nor depot master in the employ of said defendant (Tr. p. 13, f. 22.).

(*f*) That defendant never accepted service (Tr. p. 13, f. 22).

It is not necessary to allege in addition to what is alleged in said plea that said Folsom was not "a known

agent" of defendant upon whom process against defendant might be served, nor that the engines attached were not in the custody of said Folsom, nor that the copy of the writ was not left at the place where said engines were attached.

If such was the fact, the return must show it and no presumption can be made of a fact not stated in the return, to help out the return.

In *Galpin v. Page*, 18 Wallace, 350; 21 L. Ed. 959, this Court say (p.):

> "If, for example, it appears from the return of the officer, or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.
>
> "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process."

Authorities supra.

The return must show that the statute was strictly complied with, and if the copy is not given to the defendant, the return must show that and must negative the opportunity to make the service in each manner

provided in the statutes which preceeds the one attempted.

The above cases cited under subdivisions 2 and 3 are conclusive that in suits against absent defendants, the statute applicable to the particular facts of each case must be followed strictly, and no presumption can be made to help out a return of service written on the writ, not even so much as to presume that a defendant who is set up in the writ as of Concord in the State of New Hampshire, is not within the officer's precinct when the writ is served (54 Vt. 77); nor that the defendant had no known agent or attorney within the State of Vermont as a reason for leaving a copy where property was attached; consequently, it is not necessary where the plea avers the service that was made and negatives any other or different service, to go on *ad seriatim* and explain or negative any other possible service which might have been made.

The plea in this case shows that the Boston & Maine Railroad was at the time of the service, a non-resident lessee of this railroad, and the statutes of Vermont, Sections 3948 and 3949, provide how service of process against such defendant shall be made.

This return does not bring the service of the original writ within said statutes, Sections 3948 and 3949. It does not allege that Folsom was a person residing in the State upon whom service of process against the defendant, was authorized to be made.

In the plea in abatement it is alleged that no such person has been appointed, and this is not denied by the replication. The return does not allege that Folsom was either a "station agent or depot master"; it does not allege that any list of the property attached

was delivered to the defendant or to said Folsom or to anyone *for the defendant.*

The delivery of a list of property attached is a necessary and vital part of every attachment.

Vermont Statutes, Sec. 1109.
Hill v. Warren, 54 Vt. 73.
Clark & Freeman v. Patterson, 58 Vt. 676.

The return does not allege that a copy of the writ was delivered to the defendant, or to said Folsom or anyone, *for the defendant.* The allegation in the return is:

> "On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and superintendent aforesaid, at his office at Lyndonville, in said district, with my doings thereon endorsed.
>
> Attest: HORACE W. BAILEY,
> *United States Marshal.*"

Said return does not allege that the goods attached were in the custody of said H. E. Folsom at the time of attachment.

It does not allege that a copy was left at the place where the engines were attached.

Under the above decisions, none of these facts material to the validity of the service can be presumed by the court, therefore as they are not alleged in the return and cannot be presumed in support of the service, it cannot be necessary to negative them in the plea which quotes the return and avers that no other, further or different service or attachment was made or attempted.

The replication denies no averments of the plea,

consequently, all the facts alleged in the plea stand admitted upon the record.

Each party tacitly admits all such traversable allegations on the opposite side, as he does not traverse.

Gould's Pleadings, Chap. 3, Sec. 167.

"It is a rule, that every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse."

Stephen's Pleadings p. 217.
1 Chitty's Pleadings, 13 th Am. Ed. 611.
Carpenter et al v. Briggs et al. 15 Vt. 34, 41.
Murdock v. Hicks, 50 Vt. 683, 687.
Lyman v. Central Vt. Ry. Co., 59 Vt. 167, 175.
Clememt v. Graham, 78 Vt. 290, 308.

It is a rule in pleading, that where, in the pleadings of one party, there is a material averment which is traversable and which is not traversed by the other party, it is admitted.

Toland v. Sprague, 12 Peter's 300, 335; 9 L. Ed. 1093, 1107.

The above facts clearly present the question whether Vermont Statutes, Sections 3948 and 3949 required this writ to be served on the defendant by leaving a copy of the process with a station agent or depot master in the employ of the Boston & Maine Railroad.

The averment in the replication "that the said H. E. Folsom was a person residing within the State of Vermont upon whom service of process issued against this defendant might be legally made, to wit, an agent of this defendant", traverses no allegation in the plea

which it attempts to answer. It is a mere legal conclusion not sustained by the facts alleged.

In a plea in abatement for defective service it is only necessary to show such matters as fully avoid the effect of the return on the writ as made and that no other service was made. The plea of the petitioner in this case did this and was, consequently, sufficient.

VII.

The replication to the plea in abatement was insufficient and alleged, not facts, but legal conclusions not sustained by facts.

Plaintiff's replication avers that the writ "ought not to be quashed because said H. E. Folsom was on the day of the service of the original writ in this cause * * * a person residing within the State of Vermont upon whom service of process issued against this defendant, might be legally made, to wit, an agent of this defendant" (Tr. p. 16, f. 27). Whether Folsom was such an agent of the defendant below, the petitioner here, that service of process against the defendant might be legally made upon him, is a question of law depending upon the facts pertaining to his agency. None of the facts showing him to be such an agent are stated in the replication.

The substance of the plea is alleged (*supra* p. 67) and the plea in full appears on page 11, f. 18 *et seq.*, of the Transcript. The *facts* set forth in the plea show that said Folsom was ***not*** such an agent of the defendant as the Vermont Statutes made an agent of the defendant upon whom service of process against defendant could be legally made.

A traverse of plaintiff's replication would have raised no material issue, because, as we have shown above, it is not every agent of the defendant, a non-resident lessee of a railroad, on whom service of process can be made, but only those agents provided by the statute. Said Folsom was not such an agent and no *facts* are alleged showing that he was.

The insufficiency of the plaintiff's replication was raised by the demurrer (Tr. p. 18, f. 32 *et seq*). This,

of course, relates back to the sufficiency of the plea, but as we have shown before, the plea was sufficient to fully meet every issue raised by the return. The replication was insufficient, in that it did not deny any of the averments of the plea; it only alleged a legal conclusion which is not proper or permissible in pleading.

We consequently submit that the Circuit Court for the District of Vermont erred in overruling the demurrer to the replication to the plea in abatement and in adjudging the plea insufficient. In the decision rendered by his Honor, Judge Wheeler, it is held that the plea in abatement is bad for not denying Folsom's agency about or custody of the property, and that the replication bringing that agency forward is good. We submit that this position is unsound because the return does not show that Folsom was the defendant's agent about the engines attempted to be attached, nor that they were in his custody, nor that service was made nor attempted to be made on him as the defendant's agent about the property, nor as the custodian of the property. The plea denies any service or attempted service except that shown by the return. The return makes no suggestion that the copies were given to Folsom as the defendant's agent about or custodian of the engines, consequently, there was no occasion for the plea to specifically refer to that.

The same is true as to plaintiff's replication. There is no suggestion there that Folsom was the custodian of the engines nor the defendant's agent about them. Therefore, that question was not presented by the return or replication. The fact could not be presumed and it did not need to be denied in the plea.

We submit that the replication was insufficient;

that the plea was good and sufficient; therefore the replication "was" *not* "good enough for such a plea."

VIII.

The insufficiency of the original writ and service was properly raised on the record before the Circuit Court of Appeals for the Second Circuit.

These questions were fully and fairly presented to the Circuit Court for the District of Vermont by the motion of the defendant in that court to dismiss (Tr. p. 14, f. 23 *et seq.*); the defendant's plea in abatement (Tr. p. 11, f. 18 *et seq.*); plaintiff's replication (Tr. p. 16, f. 27); and the demurrer to the replication (Tr. p. 18, f. 32 *et seq*).

The opinion of the Circuit Court overruling the motion to dismiss appears in the Tr. p. 17, f. 29 *et seq.* and the opinion overruling the demurrer and holding the plea insufficient appears in Tr. p. 19, f. 34 *et seq.* and *supra* pp. 11-14.

The petitioner's exceptions to each of those holdings of the Circuit Court were properly saved by the assignments of errors numbered 1 to 28, inclusive (Tr. pp. 118-20, ff. 178-181); and also was properly called to the attention of the Circuit Court of Appeals, not only in the brief on the original argument, but by the petition for a rehearing on those questions (Tr. p. 133 *et seq.*, ff. 205 *et seq*).

IX.

The Circuit Court of Appeals had jurisdiction to determine and it was its duty to determine the sufficiency of the original writ and service, because on that depended the jurisdiction of both the Circuit Court and the Circuit Court of Appeals.

We have endeavored to show above, in subdivision 8, that the questions affecting the jurisdiction were properly presented to the Circuit Court of Appeals.

United States Statutes, Chap. 517 of March 3, 1891, U. S. Compiled Stats. 1901, p. 541, establishing the Circuit Court of Appeals, provides, among other things:

"Sec. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in in the following cases:

"In any case in which the jurisdiction of the court is in issue;"

"Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,

"And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or *citizens of different states;* ***

Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law

concerning which it desires the instruction of that court for its proper decision. * * *

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

"In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

The jurisdiction of the Circuit Court of the United States for the District of Vermont rests entirely upon the diversity of citizenship of the parties, the plaintiff in the original action being a citizen of Vermont, and the defendant therein, petitioner here, a citizen of Massachusetts.

Whether the Circuit Court for the District of Vermont acquired jurisdiction of the action or of the defendant depends upon the answer to the questions:

First. Is the original writ returnable to said Circuit Court issued in the form required by law, that is, in conformity with the United States Statutes, the statutes of Vermont and the rules of said Court?

Second. Was said writ served in accordance with the laws of Vermont and of the United States, so as to give said Circuit Court jurisdiction of the person of the defendant?

His Honor, Judge Wallace, in his dissenting opinion in the Circuit Court of Appeals, holds that these two questions are with the petitioner and that the Cir-

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cuit Court of Appeals should have dismissed the cause for want of jurisdiction in the Circuit Court for the District of Vermont for the reasons that neither the process nor the service are such as to sustain the suit.

The other two judges held that the Circuit Court of Appeals is without jurisdiction to pass upon those questions, viz., the sufficiency of the writ and the sufficiency of the service.

It is to be noted in the first instance that neither of the questions presented challenge the jurisdiction of the United States Circuit Court *as a Federal Tribunal.* They are questions of practice which go to the question of jurisdiction and simply ask whether the law for bringing a defendant into court has been complied with in the case at bar. Such being the nature of these questions, we submit that they are not questions which give the right of direct appeal from the Circuit Court to this Court.

We submit that the power is inherent in every court to determine whether a particular process returnable to it and the service thereof is sufficient to give it jurisdiction of the process and the person.

This action being originally commenced in the Circuit Court on the ground that the plaintiff was a citizen of Vermont and the defendant a citizen of Massachusetts, we respectfully submit that the sixth section of this Judiciary Act of 1891 gives the Circuit Court of Appeals final jurisdiction of every question which is presented therein, and that, if the defendant had taken a writ of error direct to this Court, assigning errors in the holdings of the Circuit Court on these questions, in that they were jurisdictional questions within the fifth section of said act, this Court would have dismissed the writ of error for

want of jurisdiction as it did in the case of Louisville Trust Company, Receiver, v. Knot, 191 U. S. 225.

We contend that the purpose of creating the Circuit Courts of Appeals was to expedite the final determination of causes in the United States Courts and to relieve *this Court* of the burden of general litigation. Such being the purpose, it can not have been the intention of Congress to provide for two appeals in the same suit, at the same time, to two different courts.

In the case at bar we think there is no debate that all the questions affecting the merits of this controversy must, under the statutes, necessarily be taken to the Circuit Court of Appeals and there finally adjudicated.

If this is so and the holding of the majority of the Circuit Court of Appeals in this case is sound then, after the Circuit Court overruled petitioner's motion to dismiss and the demurrer and held the plea in abatement insufficient, it was necessary for this petitioner to take a writ of error direct to this court to determine questions not affecting the jurisdiction of said Circuit Court as a Federal Court or waive the questions as to the writ and service.

There is no controversy in this cause that the facts relating to the citizenship of the parties are sufficient to give the Federal Courts jurisdiction of the controversy, provided the defendant is properly brought before the court. What then is the question on which the Circuit Court of Appeals would send the petitioner direct to this Court for an adjudication. It is simply the question whether the writ and the service conform to the laws of Vermont and consequently to the requirements of the United States Statutes.

We submit that there is nothing in the act creating

the Circuit Courts of Appeals which justifies a construction of that act that requires this Court to pass upon questions relating solely to practice and procedure, on direct appeal from or writ of error to the Circuit Court, even when those questions are so vital as to affect the jurisdiction of the Circuit Court in the particular case.

Writs of error to this Court are expensive, especially for litigants living in remote parts of the country. We submit that the Circuit Court of Appeals Act should not be so construed as to hold that questions affecting the sufficiency of writs returnable to the circuit courts within the several states and the service thereof, which are dependent wholly upon a proper construction of the law of the several states, must be taken direct from the circuit courts to this Court, rather than to the Circuit Courts of Appeals, unless such construction is necessary. If such is the true construction of the Act, it renders litigation in the United States Courts expensive and slow. It also places upon this Court the burden of deciding mere questions of practice and procedure as prescribed by the laws of the several states, instead of those more important questions which it was the intent of the founders of this Court should be here determined.

We submit that it was not the intent of Congress in creating the Circuit Courts of Appeals to give those courts so little power that this Court must act as the appellate court for the determination of questions affecting the proper forms of writs and the proper methods of serving process returnable to the circuit courts within the several states, and that a construction of the Circuit Court of Appeals Act which accomplishes such a result is not the correct or proper construction of said Act.

We submit further, that such construction of said

Act is not in accordance with the opinion of this Court as indicated by its previous decisions affecting the question.

This Court has already considered the construction of this Act in various phases, though we believe the exact questions here presented have not been determined by this Court.

We submit that the cases heretofore decided shedding light on the questions now before the Court are all in harmony with our contention and sustain the proposition that the questions affecting the sufficiency of the original writ and the service in this cause were within the jurisdiction of the Circuit Court of Appeals to decide and that it should have determined the same before affirming the judgment of the Circuit Court for the District of Vermont.

In *Louisville Trust Company, Receiver, etc., v. Knott*, 191 U. S. 225; 48 L. Ed. 159, this Court discussed the meaning of the word jurisdiction in the Judiciary Act of March 3, 1891.

In this case litigation was commenced in a state court against the property and estate of the Evening Post Company. While that suit was pending, Mr. Knott brought suit against the Evening Post Company returnable to the United States Circuit Court and procured judgment therein. Thereafter Mr. Knott obtained execution which was returned into the United States Circuit Court unsatisfied.

Thereupon he brought a petition to the United States Circuit Court praying for the appointment of a receiver to take charge of and administer the estate of the Evening Post Company. The United States Circuit Court appointed such receiver and he took possession of the property.

Thereupon the plaintiff in the action in the state court asked that court to appoint a receiver, and objection to this was made by the parties who had procured the receiver to be appointed in the United States Court. Their objection was overruled and the state court appointed a receiver.

Thereafter the state court directed its receiver to intervene in the suit in the Federal court and claimed the estate in question for administration and settlement in the state court. The state court held that its jurisdiction to administer the estate first attached.

Thereupon the receiver appointed by the state court intervened and filed a motion that the receiver of the Federal court be directed to turn the property over to the receiver of the state court. This action was first commenced in the Federal court on the ground of diverse citizenship. The Federal Judge on hearing dismissed the intervening petition on the ground that the Federal court had jurisdiction.

Thereupon the case was carried to this Court.

Mr. Justice Harlan delivered the opinion. On page 232 he says:

> "By the Judiciary Act of March 3d, 1891, * * * * an appeal or a writ of error, as the one or the other mode may be proper, can be taken directly from a Circuit court to this court in certain specified cases, among which is 'any case in which the jurisdiction of the court is in issue;' and 'in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision' (Sec. 5). In all cases, other than those specified in Section 5 of that act, the Circuit Court of Appeals is given appellate jurisdiction (Sec. 6).
>
> "The question presented by the certificate of the Circuit Court is not one of *jurisdiction*, within

the meaning of the 5th section of the Act of 1891, and the jurisdiction of that court was not 'in issue.' There was diversity in the citizenship of the parties to this suit, instituted by Stuart R. Knott as a citizen of Missouri, and no question was raised, or could have been raised, as to the authority of the Circuit court, as a Federal court, to take cognizance of it. The issue made by the intervening petition of the Louisville Trust Company did not involve the jurisdiction of that court, as a Federal tribunal, to appoint a receiver of the assets and property of the Evening Post Company."

After discussing the purposes and objects of that suit in the Federal court he further says on page 233:

"In all this there was nothing involving the jurisdiction of the Circuit court as a Federal tribunal, whose jurisdiction is regulated by acts of Congress. The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the Circuit court as a Federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

After discussng the decisions in other cases he proceeds on page 235 as follows:

"We repeat that the jurisdiction of the Circuit court was not and is not questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its authority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such question should be the basis of a direct appeal to this Court from the Circuit court."

Later, on the same page, the Judge quotes with

approval from the case of *Blythe v. Hinckley*, 173 U. S. 501:

> " 'Appeals or writs of error may be taken directly from the Circuit court to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this court. The Circuit court held that the remedy was at law and not in equity. That conclusion was not a decision that the Circuit court had no jurisdiction as a court of the United States.' "

And on page 236 he concludes thus:

> "In the circumstances of the present case, and to avoid misapprehension in the future, we deem it our duty distinctly to declare the true meaning of the word jurisdiction as used in the 5th section of the judiciary act of 1891.
>
> "For the reasons stated, *the appeal from the Circuit Court must be dismissed* for want of jurisdiction in this court."

We respectfully submit that on the strength of this case the Circuit Court of Appeals should determine whether the said writ and the service thereof were sufficient.

In *Carter v. Roberts*, 177 U. S. 496, this Court, discussing the duty of the Court of Appeals where a jurisdictional question or a constitutional question is involved on page 500, hold:

> "When cases arise which are controlled by the construction or application of the Constitution of the United States, a direct appeal, lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction; or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance. * * * But when the circuit court of ap-

peals has acted on the whole case its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891."

In *American Sugar Refining Company v. City of New Orleans*, 181 U. S. 277, the question was again before this Court on a petition for certiorari or mandamus to review a decision dismissing a writ of error for want of jurisdiction. In discussing the effects of the 5th and 6th sections of the Court of Appeals Act this Court held (p. 280):

"The jurisdiction referred to is the jurisdiction of the circuit court, and as the judgment of the court of appeals is made final in all cases in which the jurisdiction of the circuit court attaches solely by reason of diverse citizenship, it follows that the court of appeals has power to review the judgment of the circuit court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the circuit court attached, by reason whereof the case became embraced by section 5. * * * (p. 281).

"If plaintiff, by proper pleading, places the jurisdiction of the circuit court on diverse citizenship, and also on grounds independent of that, *** and the case is taken to the court of appeals, propositions as to the latter grounds may be certified; or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide) an appeal or writ of error would lie under the last clause of section 6, because the jurisdiction would not depend solely on diverse citizenship. * * (p. 282). Undoubtedly where the jurisdiction of the circuit court depends solely on diverse citizenship, and it turns out that the case involves the construction or application of the Constitution of the United States, or the constitutional-

ity of a law of the United States, or the validity or construction of a treaty, is drawn in question, or the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States, the circuit court of appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised, or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship the circuit court of appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. * * * In the case at bar the jurisdiction rested on diverse citizenship. Two defenses were interposed. * * * Both defenses were overruled and judgment rendered for the plaintiff. The case was then carried on error to the circuit court of appeals, which gave judgment dismissing the writ of error for want of jurisdiction. In this we think the court erred, and that a certiorari should issue that its judgment to that effect may be revised."

Most of the Circuit Courts of Appeals hold that questions such as those here presented affecting the jurisdiction of the Circuit Courts are properly within the jurisdiction of said Circuit Courts of Appeals to hear and determine. The great weight of authority in such courts is in favor of the jurisdiction of the Circuit Court of Appeals for the Second Circuit to determine the sufficiency of the writ and the service in this cause.

The Circuit Courts of Appeals for the 1st, 3d, 5th, 6th, 7th and 8th Circuits hold that they have jurisdiction to determine questions affecting the jurisdiction of the Circuit Courts when those questions come before the Circuit Court of Appeals in connection with other ques-

tions and especially in cases where the jurisdiction of the Circuit Court rests primarily upon diversity of citizenship, thus holding contrary to the opinion of his Honor, Judge Coxe, for the majority of the Court in this case. In the majority opinion Judge Coxe says (Tr. p. 128):

> "We refrain from discussing the jurisdictional question argued at the bar and in the briefs for the reason that this Court since its organization has uniformly held that the act creating the Circuit Courts of Appeal confers no authority upon these courts to pass upon questions challenging the jurisdiction of the Circuit Courts."

In *Grand Trunk Ry. Co. v. Twitchell*, 59 Fed. 727, the Circuit Court of Appeals for the First Circuit held that it is the duty of a Federal Appellate Court to take notice of its own motion that the record does not show jurisdiction in the court below, and thereupon to remand the cause and, further, that on a writ of error in an action which appears to have been improperly removed, the Appellate Court had jurisdiction, so far as to determine whether the Circuit Court has jurisdiction to hear and determine the case on its merits and has jurisdiction therefore, to award costs.

In this case the action was originally brought in the state court and removed to the Circuit Court for the District of New Hampshire, where it was tried by a jury and removed to the Circuit Court of Appeals on a writ of error and there fully argued, neither party making any question as to the jurisdiction of the Circuit Court or of the Circuit Court of Appeals, but the Circuit Court of Appeals, of its own motion, took cognizance of the fact that jurisdictional facts did not appear and remanded the cause to the state court.

In *King v. McLean Asylum of Massachusetts General Hospital et al.*, 64 Fed. Rep. 325, the Circuit Court of appeals for the First Circuit held that it had jurisdiction to determine on an application for habeas corpus, the questions relating to the jurisdiction of the Circuit Courts where other questions were involved.

Putnam, Circuit Judge, rendering the opinion says (p. 326):

> "Nothwithstanding the letter of the Act establishing this court, as found in the opening paragraph of the sixth section, apparently deprives this court of jurisdiction over fundamental questions touching the jurisdiction of the Circuit Courts, yet, in view of the provision found in the first clause of the fifth section for specially certifying questions of that particular class to the Supreme Court, that court has held that, notwithstanding that clause, we have jurisdiction over such questions, unless the issue has been made in the court below and certified to the Supreme Court as directed by the statute. We need cite only the latest cases on this point. Cary v. R. R. Co., 150 U. S. 170 and Maynard v. Hecht, 151 U. S. 324. These decisions render it unnecessary that we should consider Manufacturing Company v. Barber, 60 Fed. 465, or Sugar Refining Co. v. Johnson, 60 Fed. 503. We are clear that this rule is not limited by the subsequent clause of the same fifth section, touching cases involving the construction or application of the Constitution of the United States, and that we have jurisdiction, on records in the form of that now before us, to pass on the jurisdiction of the Circuit Courts as much when that jurisdiction is contested on constitutional grounds as when it depends solely on the construction of statutes. In this instance, subsequent enumeration in the statute does not operate as an exclusion. In view of the fact that

the jurisdiction of the Circuit Courts may allways be challenged on constitutional grounds, any other interpretation would bring the statute to unfruitful results."

In *American Sugar Refining Co. v. Johnson*, 60 Fed. Rep. 503, the Circuit Court of Appeals, Fifth Circuit, holds:

That when the whole case is taken to the Circuit Court of Appeals, that court has jurisdiction to pass upon the question of jurisdiction of the court below.

Pardee, Circuit Judge, says (p. 507):

"The record shows that the question of jurisdiction of the Circuit Court was not raised in the court below, and of course the jurisdiction is not certified as involved in the case. The first assignment of error raises the question in this court that the jurisdiction of the Circuit Court does not appear from the face of the record. The appellee, relying upon the textual provisions of section 5 of the judiciary Act of 1891, * * * * contends that this assignment of error cannot be considered in this court."

The court then cites from *Railway Company v. Swan*, 111 U. S. 379, 389; and from *McLish v. Roff*, 141 U. S. 661, 668; also from *Carey v. Railway Company*, 150 U. S. 170; and then says (p. 509):

"Reading the fifth and sixth sections of the act of 1891 in the light of McLish v. Roff and Carey v. Railway Company, and the former practice of this court, we consider that the exclusive jurisdiction of the Supreme Court, in any case where the jurisdiction of the court is in issue, only attaches when the appeal or writ of error is taken direct to that court, and that, when not so taken, but the appeal or writ of error is taken on the whole case to the Circuit Court of Appeals, that court is vested with jurisdiction to pass on all the

issues involved. As to certifying a jurisdictional question to the Supreme Court in such cases, that is only to be done when the instruction of that court is desired for the proper decision of the case. Watch Company v. Robbins, 148 U. S. 266.

"We consider, therefore, that we have full jurisdiction to pass upon the first assignment of error in this case."

And the court held that the averments of the complaint were not sufficient to give the Federal Court jurisdiction.

In *Texas & Pacific R. R. Co., v. Bloom*, 60 Fed. 979, the Circuit Court of Appeals for the Fifth Circuit affirmed the doctrine in *American Sugar Refining Co. v. Johnson* above, reaffirming their jurisdiction to pass upon the jurisdiction of the Circuit Court.

In *Snead v. Sellers et al*, 66 Fed. Rep. 371, the Circuit Court of Appeals for the Fifth Circuit held that it is the duty of an Appellate Court to direct the dismissal of the case where the complaint shows that the requisite diverse citizenship does not exist. The Circuit Court of Appeals in this case took jurisdiction of the action to the extent necessary to determine that the Circuit Court had no jurisdiction and on its order, the case was dismissed with costs.

In *Coler v. Granger County, et al.*, 4 Fed. Rep. 16, the Circuit Court of Appeals for the Sixth Circuit, Judge Taft delivering the opinion, held that when the record, upon an appeal from the Circuit Court to the Circuit Court of Appeals, presents both a question as to the jurisdiction of the former court and other questions, which, if the Circuit Court is found to have had jurisdiction, must be disposed of, the Court of Appeals has jurisdiction of the appeal and must consider the question of the jurisdiction of the Circuit Court, although that Court has dis-

missed the case for want of jurisdiction, and the Circuit Court of Appeals Act provides (Sec. 5) that where the question is alone of jurisdiction, it is to be certified to the Supreme Court. Judge Taft says in the opinion (p. 21):

> "In such a case it is quite clear that an appeal lies to this court, and that, *ex necessitate*, this court must consider the question of jurisdiction in order that it may proceed to decide the other questions raised upon the merits."

The court entertained the question of jurisdiction and decided it.

In *Baltimore & Ohio R. R. Co., v. Meyers*, 62 Fed. Rep. 367, the Circuit Court of Appeals for the Seventh Circuit held that where the jurisdiction of the court below is not the sole question presented by the record, but other questions are involved, the Circuit Court of Appeals is authorized to determine that question, as well as the others.

Jenkins, Circuit Judge, delivered the opinion and among other things says (p. 371):

> "The statute organizing this court provides for appeals or writs of error to the Supreme Court from the Circuit Court in any case in which the jurisdiction of the court is in issue, and that in such case the question of jurisdiction shall alone be certified to the Supreme Court from the court below. * * * Notwithstanding our recent ruling in Manufacturing Company v. Barber, 60 Fed. 465, that when the sole question presented by the record goes to the jurisdiction of the Court below, we are without authority to determine the question, we do not doubt, in view of the recent decision of the Supreme Court in Maynard v. Hecht, 151 U. S. 324, that when, as in this case, other questions are involved, we are authorized to determine that question as well as the others."

The court then goes on to consider the question of jurisdiction and winds up as follows on this branch of of the case (p. 373):

> "The objection to the jurisdiction is of such slight merit that we do not feel ourselves warranted in the submission of the question to the Supreme Court."

In *Rust v. United Water Works Company*, 70 Fed. 129, the Circuit Court of Appeals for the Eighth Circuit held that it had jurisdiction to determine the jurisdiction of the court below.

Sanborn, Judge, delivering the opinion, says (p. 131):

> "The defendant in error challenges the jurisdiction of this court to hear and determine the questions presented by the assignments of error. It moves to dismiss the writ of error on four grounds.
>
> "1. Because the jurisdiction of the court below to render the judgment against the American Water Works Company, which the plaintiff in error, the receiver of that company, sought by his petition to vacate and to defend against, was in issue at the hearing below, which resulted in the judgment denying the prayer of the petition, and it maintains that this question of jurisdiction can only be reviewed by the Supreme Court of the United States. But the plaintiff in error, by the allegations in his petition, placed his claim for an order vacating the judgment against the American Water Works company, and permitting him to answer for that company, on two grounds: That the Court had no jurisdiction to render the judgment; and, if it had, that the judgment was obtained by collusion, in fraud of the rights of the corporation and of the plaintiff in error, and that they had a meritorious defence to the action, which he ought to be permitted to interpose. The judgment below denied him relief on either of these grounds, and the latter did

not necessarily involve any question of jurisdiction. When a final judgment or decision has been rendered in a District or Circuit Court of the United States, the party against whom it is rendered may elect to take his writ of error to the Supreme Court, upon the question of jurisdiction alone, or to the Circuit Court of Appeals, upon the whole case. When he chooses the latter course, the Circuit Court of Appeals has jurisdiction to determine the question of the jurisdiction of the court below, as well as all other questions in the case properly presented to it for consideration. McLish v. Roff, 141 U. S. 661, 668; 12 Sup. Ct. 118; Crabtree v. Madden, 4 C. C. A. 408, 410, 54 Fed. 426; Crabtree v. Byrne, 4 C. C. A. 414, 54 Fed. 432; Sugar Refining Co. v. Johnson, 9 C. C. A. 110, 60 Fed. 503; Sugar Refining Co. v. Tatum, 9 C. C. A. 121, 60 Fed. 514."

In *United States Freehold Land & Emmigration Co., v. Gallegos et al*, 89 Fed. 769, the Circuit Court of Appeals for the Eighth Circuit, held that, where a demurrer challenging the jurisdiction of the Circuit Court and also the sufficiency of the facts alleged in the bill to constitute a cause of action is sustained on the latter grounds, an appeal by the plaintiff lies to the Circuit Court of Appeals which may determine the question of jurisdiction.

In *McCord Lumber Co. et al v. Doyle*, 97 Fed. 22, the Circuit Court of Appeals for the Eighth Circuit had before it a question involving the sufficiency of the service of process on a foreign corporation, and that court took jurisdiction and determined the question presented as to the sufficiency of the service, holding, that a mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations which is recognizable

by the local courts as valid, will receive the same recognition by the Federal Courts, subject to the limitation that such courts will determine for themselves whether the mode prescribed violates the fundamental rights of the defendant not to be condemned unheard or forced to answer a complaint in a foreign jurisdiction without a fair and reasonable notice.

Kreider et al v. Cole, 149 Fed. Rep. 647, decided by the Circuit Court of Appeals for the Third Circuit Jan. 11, 1907, is an action in equity for the appointment of a receiver for the Philadelphia & Eastern Street Railway Company. The jurisdiction of the Federal court was sought solely on the ground of diversity of citizenship. There was an intervening petition seeking to have the bill dismissed for want of jurisdiction because the requisite diversity of citizenship did not, in fact, exist and the apparent diversity of citizenship was brought about by fraud. The prayer of the intervenors was denied by the lower court, which determined that it had jurisdiction, and an appeal from that decree was taken to the Circuit Court of Appeals. That court considered the question of jurisdiction and held that the Circuit Court of the United States for the Eastern District of Pennsylvania was without jurisdiction and remanded the cause with instructions to enter a decree dismissing the bill.

Other cases where the Circuit Courts of Appeals have determined questions of jurisdiction, are the following.

Jones v. Gould et al, 149 Fed. 153, decided by the Circuit Court of Appeals for the Sixth Circuit, Dec. 14, 1906.

This is a negligence case where the question of jur-

isdiction was raised with other questions and determined.

Jennings v. Johnson et al, 148 Fed. 337, decided by the Circuit Court of Appeals for the Fifth Circuit, Oct. 16, 1906.

In this case the Court say (p. 339):

> "No principle is more vital to the administration of justice than that no man should be deprived of his property without notice and an opportunity to make his defence."

The Circuit Court of Appeals for the Second Circuit has, in at least one case, taken to itself authority to decide a question affecting jurisdiction of the Circuit Court of the United States for the Southern District of New York.

Scribner et al v. Straus et al; Charles Scribner's Sons v. same, 147 Fed. p. 28.

This case decided June 16, 1906, came before the Circuit Court of Appeals on an appeal from decrees dismissing bills alleging infringement of copyrights. The court held that no infringement of copyrights was involved, and that the court had no jurisdiction on other grounds, saying (p. 31):

> "But this question is not open to discussion in these cases, as there is neither the diversity of citizenship, in the first case, nor the claim of damages in the sum of $2,000, in either case, requisite to confer jurisdiction of questions not arising out of the copyright law."

X.

The Circuit Court of Appeals cannot properly affirm a judgment rendered by a Circuit Court when it appears on the face of the record that the Circuit Court had no jurisdiction of the original action, nor of the defendant therein.

A judgment rendered by a court without jurisdiction of defendant is of no effect, and especially when the lack of jurisdiction is apparent on the face of the record. If the lack of jurisdiction is properly called to the attention of the court, the cause should be dismissed.

If the court of original jurisdiction declines to dismiss the cause and the want of jurisdiction in said court is called to the attention of the appellate court, as in this case, the appellate court should dismiss the action.

We submit that in the case at bar it was apparent on the face of the record that the Circuit Court for the District of Vermont was without jurisdiction. This was called to the attention of the Circuit Court of Appeals, consequently, that court should have dismissed the action. We submit that the Circuit Court of Appeals was without jurisdiction to affirm the judgment, irrespective of the merits of the controversy, when the record, as shown by the dissenting opinion of his Honor, Judge Wallace, showed that the Circuit Court of the District of Vermont had no jurisdiction of it.

The lack of jurisdiction in the court is a question which may be raised at any stage of the proceedings, and the court is bound, whenever and wherever raised, to take notice of the want of jurisdiction and act accordingly.

Kreider v. Cole, 149 Fed. Rep. 647, 649.

In the opinion in the above case, Judge Gray says:

> "A question of jurisdiction is fundamental and underlies all other questions arising in the course of a litigation. Such a question may be raised at any time, in any mode, and at any stage, as every step taken in the progress of a cause is an assertion of jurisdiction, and the court may, of its own motion, make the objection or institute such investigation as may be necessary to establish or defeat it. This is especially true of the Federal courts, as being courts of limited or statutory jurisdiction."

We submit that it is the duty of every court, before rendering a judgment, to determine whether it has jurisdiction of the parties and the subject matter. If it is an appellate court, it must determine whether the court of first instance had jurisdiction, for unless the court to which the original process was returnable acquired jurisdiction of the parties and of the process, the appellate court is without jurisdiction.

Ryder v. Holt, 128 U. S. 525; 32 L. Ed. 529.

CONCLUSION.

We contend, therefore, that it was error for the Circuit Court of Appeals to affirm the judgment of the Circuit Court on the merits, without considering the questions affecting the jurisdiction, especially when those questions, if properly determined, would have defeated the action.

We respectfully submit that this Court should adjudge;

1st. That the writ and service were each insufficient, and that the Circuit Court for the District of Vermont was without jurisdiction.

2d. That the questions pertaining to the sufficiency of said writ and service were within the jurisdiction of the Circuit Court of Appeals for the Second Circuit to hear and determine, and that it should have determined the same.

We further submit that this Court should, and we request that it do, enter a judgment dismissing said cause for want of jurisdiction in the Circuit Court for the District of Vermont, with costs to this petitioner in all courts.

Or, if more proper, that this Court remand the cause with instructions to the lower court to dismiss said cause with costs to this petitioner in all courts.

Respectfully submitted,

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GEORGE B. YOUNG,
Attorneys for Petitioner.

NEWPORT, VERMONT.

Office Supreme Court, U. S.
FILED
MAR 19 1909
JAMES H. McKENNEY,
Clerk.

REPLY BRIEF FOR PETITIONER.

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 198.

BOSTON & MAINE RAILROAD

v.

JOHN N. GOKEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOHN YOUNG AND GEORGE B. YOUNG,
ATTORNEYS FOR PETITIONER,
NEWPORT, VERMONT.

Supreme Court of the United States.

OCTOBER TERM, 1907

No. 198.

BOSTON & MAINE RAILROAD

v.

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COMMENTS ON RESPONDENT'S BRIEF.

As to the statutes and argument on pages 1 to 3, it will be noted that Section 914 prescribes the practice, pleadings, etc., ***existing at the time in state courts.*** Section 918 authorizes the making of rules ***not inconsistent*** with any law of the United States, consequently, not inconsistent with Section 914. Petitioner's Brief, pp. 1-3.

Rule 7 of the Circuit Court for the District of Vermont is in accordance, not in conflict, with Section 914, as it provides that the form of process and declaration ***shall be*** the same as is or ***may be provided by the laws of Vermont,*** and rule 8 as to when process shall be returnable, provides that it shall be returnable to the ***next*** regular term, ***if there shall be time for seasonable service thereof according to the laws of Vermont.*** The statute providing for service in force when the rules were adopted requiring process against corporations to be served at least thirty days before the term. This subject is considered in our brief, pp. 34 to 39.

The following statements of fact are incorrect. On page 5 it is stated that, prior to 1893, all writs against private corporations were served as other writs, twelve days before the term of court to which they were returnable. This does not appear in the record. Is not true and no case is or can be cited to sustain the proposition. The practice in suits against corporations was in accordance with the provisions of the statutes. P. 5.

Rules 13 and 14 of the Circuit Court appearing on page 7 have no application. P. 7.

On page 10, near the bottom, it is stated that Folsom had the custody of the property attached. ***This does not appear.*** It is not the fact. Again, on page 3 of Supplemental Brief, it is stated that the proper construction of the return shows that Folsom had the care and custody of the engines attached. We insist the return can not be so construed. P. 10.

On page 11 is copied section 1098 of Vermont Statutes relating to insurance, telegraph, telephone, express and ***shipping car companies,*** and the claim is made that petitioner is in the ***shipping car*** business. P. 11.

It does not appear that it is, and in fact, it is not. This statute has no application to this case.

As to the alleged defects in the plea in abatement; page 14 avers the misuse of the word "or" and cites one or two cases in support of the claim. We recognize the rule mentioned as laid down in State v. Ward and Morse v. Nash, but submit that that rule does not apply to this plea. We respectfully submit that the use of the word "or" in each of the cases mentioned is the proper word, and that "nor" would have been an improper word. P. 14.

The sixth defect alleged is the omission of any allegation in the plea that petitioner did not, on the day in question, own, operate and manage another railroad or railroad property at said Lyndon. We submit that this is not necessary. Pp. 15-16.

The writ (Tr. p. 4) alleges

"That the defendant before and at the time of committing the grievances hereinafter mentioned, operated and maintained a certain railroad and the appurtenances thereto belonging, to wit, at Lyndon in the County of Caledonia and District of Vermont, and the plaintiff was then and there employed by the defendant to perform the duties of a brakeman on its said railroad."

It appears from the original writ and the plea in abatement, that the petitioner is a Massachusetts corporation. There is no statute authorizing the ownership of a railroad in Vermont by a foreign corporation. We understand the common law to prohibit the ownership of the stock in one corporation by another corporation, except when specially authorized by the legislature. The ownership of any railroad in Vermont or the stock of any railroad in Vermont by an alien corporation is expressly prohibited by Public Statutes of Vermont, Sections 4330 and 4331, being Sessions Laws No. 6 of 1898. Therefore, it cannot be presumed that the petitioner, a foreign corporation, owned another railroad in Vermont and such fact did not need to be denied. See our Brief p. 40, 49 et seq.

The provisions of Sections 1096 and 1097, cited in the petitionee's brief, apply only to domestic corporations and have no application to foreign corporation.

As to the 19th objection that the plea was not sworn to, the record (pages 13 and 14) shows that the plea was sworn to before George E. Johnson, the Clerk of the Circuit Court. P. 19.

On page 20, the claim is made that the questions of jurisdiction are waived, and cases are cited. The cases cited simply hold that where a general demurrer is filed to the declaration or answer because it does not state a cause of action or defence; the demurrer is overruled, and the party filing the demurrer thereupon pleads over to the merits, without insisting upon the demurrer, it is waived. We submit that the motion and plea in abatement to the jurisdiction is not waived in the case at bar, but was properly preserved and presented in the Circuit Court of Appeals. The claim was there made that these questions were waived, but that court, both the judges announcing the majority opinion (Tr. p. 128) and Judge Wallace in his dissenting opinion (Tr. p. 132) considered the question as P. 20.

before the court, and Judge Wallace cites authorities holding that the question was not waived. This shows that the Circuit Court of Appeals for the Second Circuit understand that, according to the practice in that Circuit, the questions were properly saved and before that court. We submit that the authorities referred to by Judge Wallace and cited in our brief on pages 21 and 47 are full authority in this Court for the proposition that pleading to the merits after our motion to dismiss and plea in abatement to the jurisdiction had been overruled, did not waive our rights to insist upon the lack of jurisdiction.

Harkness v. Hyde, 98 U. S. 476.

Southern Pacific v. Denton, 146 U. S. 202.

Mexican Central Railroad.Co. v. Pinkney, 149 U. S. 194.

These authorities are later than any of the cases referred to in petitionee's brief, and when these cases were decided, the cases referred to by petitionee must have been known to this Court.

We also call attention to the fact that none of the objections now raised to the the plea in abatement were ever raised before. They were not presented or considered either in the Circuit Court or the Circuit Court of Appeals.

On page 4 of the Supplemental Brief, some cases are cited to the proposition that the presumption of law is in favor of the legality of officer's returns. This is stated more broadly than the cases justify. These cases hold that no fact will be presumed to defeat the return; that a fair construction will be placed on a return, and if it is as consistent with regularity as with irregularity, regularity will be presumed. There is nothing in these cases which suggests that any affirmative facts will be presumed to sustain the return; nothing that indicates presumptions will be made either way, except as above stated; viz., when the return is as consistent with regularity as irregularity, regularity is presumed. The return in this case is ***not consistent with regularity*** in the sense of legal service.

Sup. Brief P. 4.

The case on which petitionee relies to sustain the jurisdiction in the case at bar is Shepard v. Adams, 169 U. S. 618 which is clearly distinguishable from the case at bar. P. 8, 22.

In that case the rule of the District Court, when adopted, conformed substantially to the Colorado statute then in force and was continued as the rule of the District Court after the statute of Colorado was changed. The rule fixed a definite time for the return of process. The process conformed to the rule. That it did, was not questioned.

In that case, the question presented to this Court was, whether the rule itself was valid or in conflict with the United States Statutes in that it did not conform to the Colorado statute at the time the process issued. The only question in that case was the validity of the rule.

In the case at bar, the validity of the rules of the Circuit Court for the District of Vermont is not questioned. By the terms of the rule, the form of process should conform to that of the state, the return time of the writ depends upon there being time for seasonable service under the law of Vermont when the process issued. It is contended here that the original writ does not conform to the rules or to the statutes. This is a clear distinction in the cases.

We submit, further, that Judge Wallace, in his dissenting opinion, recognized this distinction and fully appreciated the facts material to the proper determination of the questions in issue and that his conclusion was sound.

In Shepard v. Adams, this Court held (p. 623) that, if there was no valid service of process, the Court acquired no jurisdiction and the judgment was void. The Court sustained the rule in question on the presumption that the discretion of the District Court was legitimately exercised in its adoption and maintenance.

Respectfully submitted,

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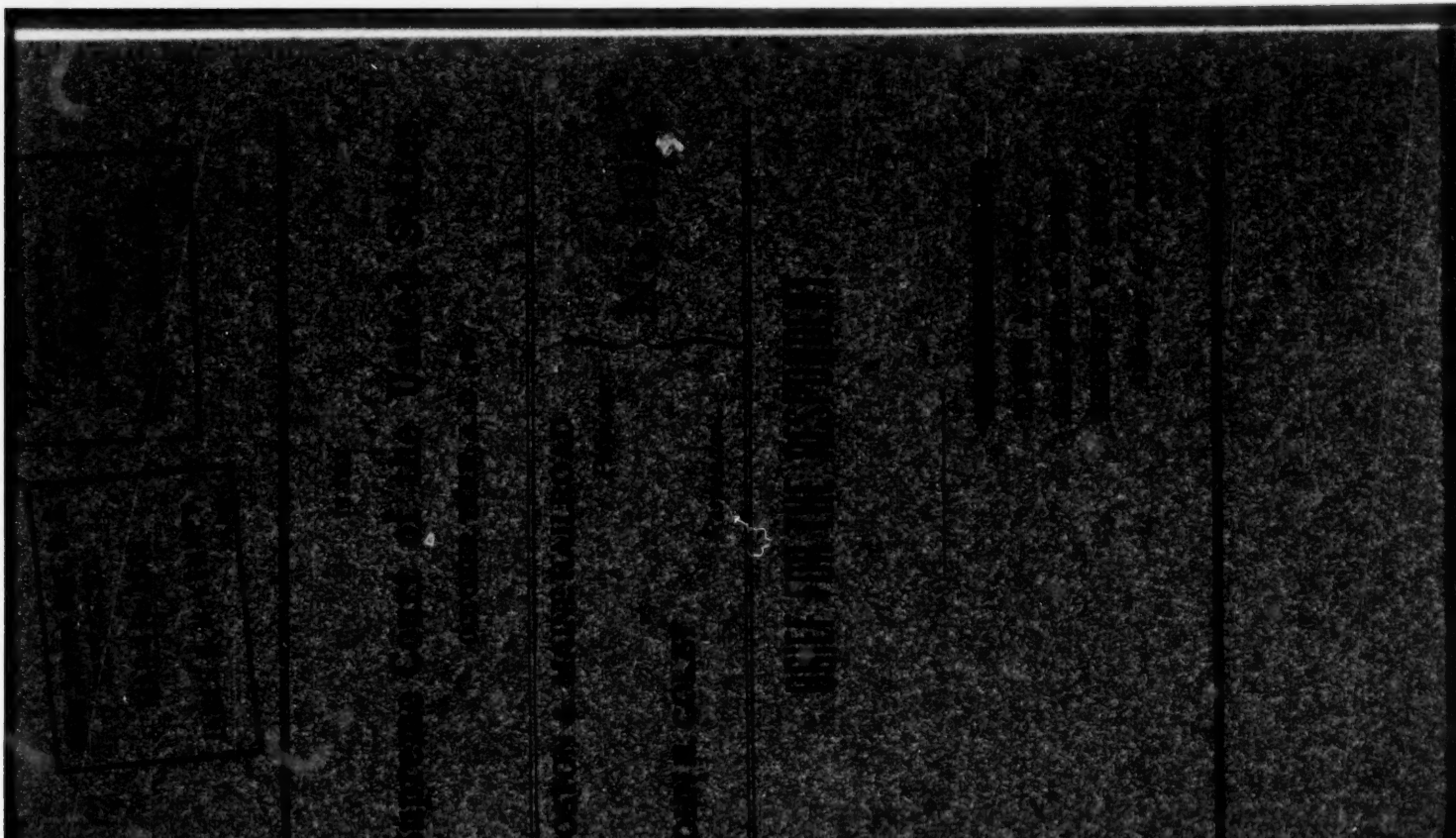

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1907.

BOSTON & MAINE RAILROAD
Petitioner,
vs.
JOHN N. GOKEY,
Respondent.

Brief for the Respondent

By CHARLES A. PROUTY,
EDWIN A. COOK,
HARLAND B. HOWE,
HERBERT W. HOVEY.

THE ORIGINAL WRIT IN SAID CAUSE, RETURNABLE TO THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF VERMONT, WAS SUFFICIENT.

The original writ *is under the seal of the court* from which it is issued and is signed by the clerk thereof.

The original writ is in accordance with the requirements of Sections 914 and 918 of the Revised Statutes of the United States, is in accordance with Rules 7 and 8 of the United States Circuit Court for the District of Vermont, adopted at the May Term 1885, and is in accordance with the Statutes of the State of Vermont relating to form, time of service, and return of writs, which were in force when said rules of court were adopted.

Sec. 914 of the Revised Statutes of the United States is as follows: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, *as near as may be,* to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in

the courts of record of the State within which such circuit or distict courts are held, any rule of court to the contrary notwithstanding."

Sec. 918 of the Revised Statutes of the United States is as follows: "The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Rule 7 of the United States Circuit Court for the District of Vermont adopted at the May term 1885 is as follows: "The form of process and declaration shall be the same as is or may be, provided by the laws of this State, and in cases not expressly provided for by such laws, in the form used in the County and Supreme Courts of the State *so far as they may be applicable to Federal Courts.*"

Rule 8 of the United States Circuit Court for the District of Vermont adopted at the May term 1885 is as follows: "All process shall be dated the day it issues, *and all mesne process shall be returnable to the next regular term,* if there shall be time for seasonable service thereof, according to the laws of this State, otherwise it shall be returnable to the next regular term thereafter; final process shall be returnable to the next regular term, or otherwise, if so specially ordered by a judge."

In the year 1880, for many years prior thereto, and until the year 1893 the statutory requirements in Vermont as to service and return of writs was specified in Sec. 868 of the Revised Laws of Vermont of 1880, viz.: "Every writ and process, returnable before the supreme or county court, shall be served at least *twelve days* before the session of the court to which it is returnable, including the day of service, and excluding the return day. A writ against a sheriff,

high bailiff, or constable, for default, neglect, or misconduct in their offices, shall be served at least eighteen days before the session of the court to which it is made returnable. A writ against a town, county, school district, or other corporation, shall be served at least thirty days before the session of the court to which it is made returnable, except writs in which such town, county, school district, or other corporation may be summoned as trustee or trustees."

In the year 1880, for many years prior thereto, and until the year 1893, the prescribed form of a writ of attachment to be used in the State Courts of Vermont was as specified in the Revised Laws of Vermont of 1880, Sec. 4550, Form 2, viz.:

"STATE OF VERMONT, }
..... ss. }

To any sheriff or constable in the state, GREETING:

By the authority of the State of Vermont, you are hereby commanded to attach the goods, chattels or estate of A. B., of ....., in the County of ....., to the value of ..... dollars, and him notify thereof according to law; and also notify him to appear before the ..... court, next to be held at ....., within and for said County of ....., on the ....., then and there, in said court, to answer to C. D., of....., in a plea (here insert the declaration) to the damage of the plaintiff ..... dollars, for the recovery of which, with just costs, the plaintiff brings suit.

Fail not, but make service and return according to law.

Dated at....., in the County of ..... the ..... day of ....., in the year of our Lord .....

E. F., Clerk, (Justice of the Peace or Master in Chancery.)

G. H., recognized to the defendant in the sum of ..... dollars, as surety for costs of prosecution, as the law directs.

Before me, E. F., Clerk, (Justice of the Peace or Master in Chancery.)"

The Hon. Hoyt H. Wheeler, a very eminent jurist, who presided at the trial of the case at bar in the Circuit Court,

was one of the judges of the Supreme Court of Vermont, the State Court of last resort, from 1869 to 1877. From 1877 until his death in 1906 he was judge of the United States Circuit and District Courts for the District of Vermont and held that office when Rules 7 and 8 were adopted. He was thoroughly conversant with the forms of process and the rules of practice in both the state and federal courts of Vermont from 1869 to 1906, and in his discussion of the motion to dismiss (transcript page 30) he summarizes the situation as follows: "This question would be more serious and difficult but for Sec. 918, Rev. Stat., which provides that the several circuit and district courts may, from time to time, 'make rules and orders directing the returning of writs and processes,' 'as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.' In the State courts there are but two terms in a year having jurisdiction of such cases; and it appears to have been thought best to have writs returnable oftener; but this Court has three regular terms in each year, and it has not been considered that to have writs returnable oftener, would be advantageous for the advancement of justice or the prevention of delays. Therefore, the rule requiring such process to be returnable at the regular terms has been retained without change. That this course is proper seems to appear not only from the words of the statutes, but from Shepard vs. Adams, 168 U. S., 618, where a summons made returnable according to the rule of the Federal Court and not in conformity with a changed State statute, was, after full examination of the subject, upheld."

No form of writ requiring service to be made within twenty-one days from date or appearance within forty-two days from date was prescribed by the Statute of Vermont, or used in the State of Vermont, until the year 1893, but on the contrary all writs were made returnable to the next regular term of court, as in the form above cited. During the entire period since 1893 the form of process and rules of practice remained the same in the Circuit and District courts of the United States for the District of Vermont, and

Judge Wheeler repeatedly held that he would not adopt or follow the Vermont Statutes of 1893 because it was not applicable to the United States Circuit and District Courts for the District of Vermont. The form of writ used in the case at bar is the same as has been used in the Circuit Court for the District of Vermont ever since Rules 7 and 8 were adopted in 1887 and for many years prior thereto.

The original writ in this case is dated the 25th day of April, 1904, is returnable to the next regular term of the Circuit Court, on the 3rd Tuesday of May, 1904, which was the 17th day of May, twenty-two days from the date of the writ, and was served on the 2nd day of May, 1904, or *fifteen* days before the term to which it was returnable.

Sec. 868 of the Revised Laws of Vermont above cited provides: "Every writ and process, returnable before the Supreme or County Court, shall be served at least *twelve* days before the session of the court to which it is returnable." This requirement was complied with.

The latter part of Sec. 868 provides: "A writ against a town, county, school district, or other corporation, shall be served at least thirty days before the session of the court to which it is made returnable * * * ." When this section was in force in Vermont it was the universal practice to serve writs against private curporations precisely as against individuals, that is to say, at least *twelve* days before the session of the court to which they were made returnable. The words of the Statutes, "town, county, school district, or other corporation" were always construed to mean, "town, county, school district, or other corporation of a like nature, viz.: municipal corporation," and were so construed by the trial courts of Vermont, but the Supreme Court of Vermont never had occasion to pass upon the question. The Circuit Court for the District of Vermont construed this clause of the Statute, in the same way as it was construed by the trial courts of Vermont as fully appears by the opinion of Judge Wheeler above referred to.

It would be impossible to comply with Rule 8, supra, and use the form of writ in use in the State Courts of Ver-

mont since 1893. Rule 8 requires "that all mesne process shall be returnable to the next regular term" while the form of writ in use in the State Courts of Vermont since 1893 is not returnable to any term whatever but requires that service and return be made within twenty-one days, and that the defendant enter his appearance with the clerk of court within forty-two days of the date of the writ, whenever that may be, whether in vacation or in term time. If a writ must be made returnable to a regular term of the Circuit Court for the District of Vermont in accordance with Rule 8, and also contain the direction "fail not but service and return make within twenty-one days from the date hereof," as required by the Statutes of Vermont since 1893, and as claimed by counsel for the petitioner in their brief, then we submit that there are only three days in a year in which a writ can be lawfully issued in the Circuit Court for the District of Vermont, viz: the 21st day before each of the three terms of the Circuit Court. If a writ must be made returnable to a regular term of the Circuit Court in accordance with Rule 8, and also require the defendant to enter an appearance with the clerk of the court within forty-two days from the date of the writ, then there are only three days in a year in which a writ can be issued in the Circuit Court for the District of Vermont, viz., the 42nd day before each of the three terms of the Circuit Court.

If both of these features of the Statutes of Vermont since 1893 are to be complied with, it would be absolutely impossible to commence a suit in the United States Circuit Court for the District of Vermont, because the form of writ used in the state courts of Vermont since 1893 commands the officer, "fail not but service and return make within twenty-one days from the date hereof." and the defendant is notified to cause his appearance to be entered with the clerk of the court on or before the expiration of forty-two days from the date thereof. By Rule 8, supra, the writ must be made returnable to the next regular term; by Rule 13 the suit must be docketed on the 1st day of the term; and by Rule 14 the defendant's appearance must be entered on the docket on

the 1st day of the term. Unless the first day of some term of the Circuit Court should occur during the twenty-one days the officer could not return the writ. Unless the first day of some term of the Circuit Court occurred after service and before the expiration of forty-two days the defendant would have no opportunity to appear. If the defendant should take his full forty-two days in which to appear it would be absolutely impossible to bring the defendant into court.

Rules 13 and 14 of the United States Circuit Court for the District of Vermont, adopted at the May Term 1885 are as follows:

"13. All suits shall be docketed on the *first day of the term* to which they are returnable, but for special cause the Court may permit a suit to be docketed at a later day in the term.

14. The appearance of the defendant in person, or by an attorney of this Court, residing within the district, shall be entered on the docket on the *first day of the term*, at which he is required to appear, but for special cause, the Court may permit an appearance to be entered at a later day in the term."

Therefore, the respondent respectfully submits that the original writ in this case is in accordance with the requirements of Sections 914 and 918 of the Revised Statutes of the United States, is in accordance with Rules 7 and 8 of the United States Circuit Court for the District of Vermont adopted at the May Term 1885, and is in accordance with the Statutes of the State of Vermont relating to form, time of service, and return of writs, which were in force when said rules of court were adopted. If any attempt had been made to make the original writ comply with the later statutory requirements of the State of Vermont, the writ would then have been insufficient because it would have been in direct violation of Rule 8 of the United States Circuit Court for the District of Vermont.

That Rule 8 of the Circuit Court of the United States for the District of Vermont should prevail over later State Legislation is evident from the decision of Shepard vs. Adams,

169 U. S. 618. This case is squarely in point. In the case cited a summons issued by the United States District Court for the District of Colorado which required the defendant to appear within ten days from the time of service was held to sufficiently conform to the Statutes of Colorado regulating the practice of the State Courts although these statutes provide that the time within which a summons should require the defendant to appear was twenty days. This conclusion was reached because the summons by the Federal Court was issued in accordance with a rule of that court which was adopted when the existing statutes of the State prescribed that a summons should require the defendant to appear within ten days, but which rule was not changed to conform with a subsequent change in the Statutes of Colorado. The United States Supreme Court said; "The general rule, under which was issued a summons by which the petitioner was brought into court, was adopted by the district court of the United States for the District of Colorado on October 10, 1877, and it was in substantial conformity with the statute of Colorado then in force. Several changes in the laws of Colorado, regulating forms of procedure and the times given for defendants to appear to writs of summons, have been since enacted, but the district court has not seen fit to alter its rules from time to time, in subserviency to such changes. We have a right to presume that the discretion of the district court was legitimately exercised in both adopting and maintaining the rule in question; and its judgment is accordingly affirmed."

Judge Wallace, in his dissenting opinion, in which he holds that the motion to dismiss should have been granted, cites with approval Shepard vs. Adams, supra, and approves the doctrine that the rules of the Circuit Court should prevail over later state legislation. He entirely overlooks, however, the conflict between the rules of the Circuit Court above cited and the statutes in force in Vermont since 1893. We submit that if he had appreciated the fact that it would be absolutely impossible to issue a writ in accordance with the rules of the Circuit Court for the District of Vermont

adopted in 1885 and conform to the Statutes of Vermont in force since 1893, his views would have been different.

THE SERVICE OF THE ORIGINAL WRIT WAS SUFFICIENT TO GIVE THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF VERMONT JURISDICTION OF SAID ACTION AND OF THE DEFENDANT THEREIN.

The officer's return is as follows:

"UNITED STATES OF AMERICA,
DISTRICT OF VERMONT, ss.

At Lyndon, in said district, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within named defendant, The Boston & Maine Railroad Company, its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. & M. R. R. Co., by H. E. Folsom, one of its accredited agents and a Division Superintendent within said district. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and Superintendent aforesaid, at his office at Lyndonville, in said district, with my doings thereon indorsed.

Attest: HORACE W. BAILEY, United States Marshal."

Sec. 3948 and 3949 of the Vermont Statutes are as follows:

"The trustees under an assignment, mortgage, or other transfer, executed by a railroad company, and the lessees of the railroad company not resident in the State, who hold possession of the property of such railroad company, or manage the running of its road, under such assignment, mortgage lease, or other transfer, shall if they reside without the State, appoint a person resident in the State, upon whom service of process may be made; and shall, in the month of January, annually file in the office of the clerk of the county court in each county through which the road passes, a certificate signed by such trustees or lessees, designating the name and residence of the person thus appointed."

"Service of process upon such person shall be a legal service on such trustees or lessees; and if the trustees or lessees do not appoint such agent, and file such certificate, service *may* be made by leaving a copy of the process with a station agent, or depot master, in the employment of such trustees or lessees, and the same shall be legal service of such process upon such trustees or lessees."

The marshal in the service of this writ was not obliged to follow sections 3948 and 3949 as those particular sections prescribe only one of several methods by which service could have been made on the petitioner.

Sec. 3949 says: "service *may* be made by leaving a copy of the process with a station agent * * * ." This statute is not mandatory. It merely furnishes an additional mode of service, and it does not require that service be made in that way.

Sec. 1109 and Sec. 21 of the Vermont Statutes are as follows:

"When the goods or chattels of a person are attached at the suit of another, a copy of the attachment and list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, as directed in the service of summons, and if such person is not an inhabitant of the state, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached; and the delivery of such copy shall be certified by a sworn officer who served the attachment, or by the affidavit of a disinterested person who delivered the same."

"The word 'person' may extend and be applied to bodies corporate and public. "

The officer's return shows that service by attachment was made in accordance with Sec. 1109. Folsom was a "known agent" about the property attached although he may not have been a strictly appointed person for service of the process. An "accredited agent and division superintendent" is certainly a "known agent." Leaving a copy in his hands, he having the custody of the property attached,

was leaving it at the place where such goods and chattels were attached in accordance with the requirements of Section 1109. Hill vs. Warren, 54 Vt. 73.

Sec. 1098 of the Vermont Statutes is as follows:

"If a corporation, company, association or copartnership, not organized under the laws of this state, and doing an insurance, telegraph, telephone, express or *shipping car business herein*, files with the secretary of state a stipulation agreeing that legal process against such corporation, company, association, or copartnership, may be served on such secretary, as required by law; service of process against it, made upon such secretary by delivering to him duplicate copies thereof, shall be sufficient. If such stipulation is not so filed with the secretary of state, process may be served in like manner and with the same effect upon a manager, agent, operator, or messenger of such corporation, company, association or copartnership."

The officer's return shows that service was also made in accordance with Sec. 1098.

The petitioner is a corporation not organized under the laws of the State of Vermont, and doing a *shipping car business* therein, and service made upon Folsom as an *accredited agent and division superintendent* is a compliance with this statute, which provides that service may be made upon a *manager, agent*, operator, or messenger of such corporation.

As to the time of service the writ was served on the 2nd day of May, 1904, or fifteen days before the May Term of the Circuit Court to which it was returnable. This was in strict compliance with Rule 8 of the United States Circuit Court for the District of Vermont, and was in strict compliance with the requirement of Sec. 868 of the Revised Laws of the state of Vermont, in force at the time said rule was adopted, and which provided that every writ and process returnable before the Supreme or County Court should be served at least *twelve* days before the session of the court to which it is returnable.

The petitioner cannot now take advantage of any questions raised in its motion to dismiss, because, at the time of filing said motion the petitioner also filed a plea in abate-

ment wherein it prayed that the writ be dismissed because of an alleged defect in the service thereof. and thereby waived its motion to dismiss. The filing of the latter was a waiver of all rights under the former. Steven in his work on pleading, Tyler's Ed., page 373 gives the order of pleading as follows:

"PLEAS.

1. To the jurisdiction of the court.
2. To the disability of the person. { 1. Of plaintiff. 2. Of defendant.
3. To the count or declaration.
4. To the writ: { 1. To the form of the writ: { 1. For matter apparent on the face of it. 2. For matter dehors the writ. 2. To the action of the writ.
5. To the action itself in bar thereof."

Steven then says: "In this order the defendant may plead all these kinds of pleas successively. Thus, he may first plead to the jurisdiction, and, upon demurrer and judgment of respondent ouster thereon, may resort to a plea to the disability of the person; and so the end of the series.

But he cannot plead more than one plea of the same kind or degree. Thus, he cannot offer two successive pleas to the jurisdiction, or two to the disability of the person.

So he cannot vary the order; for by a plea of any of these kinds he is taken to waive or renounce all pleas of a kind prior in the series."

Chitty after giving the same order of pleading as above, says: "This, it is said, is the natural order of pleading, because each subsequent plea admits that there is no foundation for the former, and precludes the defendant from afterwards availing himself of the latter, as when the defendant pleads to the person of the plaintiff he admits the jurisdiction of the court, for it would be nugatory to plead that defence in a court which has no jurisdiction; and when the defendant pleads to the count he admits that the plaintiff is able to sue him and the defendant to be sued; and when the defendant pleads to the form of the writ he admits the form of the count; and after a plea in bar to the action the defend-

ant cannot plead in abatement, unless for new matter arising after the commencement of the suit. If this order of pleading be inverted, the defendant will be precluded from pleading any matter prior in point of order." 1 Chitty on Pl. 8 Am. ed., 441.

Com. Dig. Abatement.

The motion to dismiss attacks the form of the writ, viz.: defects on the face of the writ. The plea in abatement attacks the service thereof, viz.: matter dehors the writ. Thus, the motion is prior in the series to the plea, as appears by the order of pleading, supra, and is waived by the filing of the plea.

The Statute of Vermont authorizing the defendant to plead several pleas does not embrace dilatory pleas so as to allow several of such pleas to be pleaded at the same time.

Culver vs. Balch, 23 Vt. 618.

Upon the question of the validity of the service of process the petitioner must rely on its plea in abatement alone, and not upon its motion to dismiss, as issuable allegations are not allowable in motions.

Bliss vs. Smith, 42 Vt. 198,
Johnson vs. Williams, 48 Vt. 565.
Tracy vs. Grand Trunk Railway Co. 76 Vt. 313,
Rubel vs. Beaver Falls Cutlery Co., 22 Fed. Rep. 282.

Pleas in abatement must be certain to a certain intent in every particular, and preclude all argument, inference, or presumption against the party pleading; and, as it has been well expressed, they must have that technical accuracy which is not liable to the most subtle, scrupulous objection, and this is not merely a rule of construction, but of addition; for when this certainty is necessary, the party must not only state the facts of his case in the most precise way, but must add to them such facts as show that they are not to be controverted, and, as it were, anticipate the cause of his adversary.

1 Chitty's Pl. 8 Am. ed. 234.

In State vs. Ward, 60 Vt. 153 the court held that the common law rules relating to pleas in abatement have never been relaxed in Vermont.

The plea is defective in the following particulars:

(1) The allegation in the plea (a) "and was not operating said 'railroad' *or* 'railroad property' in any other 'capacity', 'way', or 'manner' except as such lessee." (b) The allegation "there was no person residing within the State of Vermont 'authorized' *or* 'appointed' by this defendant." (c) The allegation "upon whom service of process issued against this defendant 'may' *or* 'might' be made." (d) The allegation "the only 'service' *or* 'attempted service' of the original writ." (e) The allegation "was ever 'made' *or* 'attempted to be made' in any 'manner,' *or* 'form.'" (f) The allegation "upon whom service of process issued against this defendant 'may' *or* 'might be made.'" (g) The allegation "is not now a 'station agent' *or* 'depot master' in the employ of this defendant." (h) the allegation "that no other nor different service was ever 'made' *or* 'attempted to be made.'" (i) The allegation "has never accepted service of this writ in any 'way' *or* 'manner', do not present traversable issues. No one can say whether the pleader intended to present an issue whether the defendant was not operating said 'railroad' *or* 'railroad property' in any other 'capacity', 'way', *or* 'manner'; whether there was no person residing within the State of Vermont 'authorized' *or* 'apponited' by this defendant upon whom service of process 'may' *or* 'might' be made; whether it was the 'only service' *or* 'attempted service' of the original writ which 'was ever made' *or* 'attempted to be made' in any 'manner' *or* 'form'; whether Folsom was a person residing, etc., upon whom service of process 'may' *or* 'might be made;' whether he was not 'station agent' *or* 'depot master'; whether no other nor different service was 'ever made' *or* 'attempted to be made.'

In Morse vs. Nash, 30 Vt. 76, in discussing a plea in abatement containing the expression "and was not 'issued' *or* 'served' in any other way or manner whatever," the

court say: "The expression 'and was not issued' *or* 'served' in any other way or manner whatever, by the strict use or legitimate force of the word 'or' instead of 'nor' is putting an alternative between the happening of the one or the other of two facts instead of being a denial of both," and held the plea in abatement in that case bad for that reason.

In State vs. Ward, 60 Vt. 142 where the word 'or' was used the same as it is used in the plea in the case at bar, the court said: "The plea in abatement was clearly insufficient. It is lacking in the certainty required in such a plea. It is also defective in presenting several issuable facts, disjunctively, by the use of 'or' as pointed out in the brief for the prosecution. Such pleadings would multiply indefinitely the issues involved in the case, and lead to confusion and prolixity, instead of eliminating all extraneous matter and narrowing the pleading to a single determinative issue, which is the crowning merit of common law pleadings."

Thus the plea in the case at bar is bad in eleven particulars where the word "or" is used as above mentioned.

(2) Because there are eleven different allegations of time without the use of the letters "A. D." or the words "in the year of our Lord." The time may have been B. C.

(3) Because of the use of the character "&" in the name "Young & Young", and in the name "Connecticut & Passumpsic Rivers Railroad Company."

(4) Because it is alleged in the introduction of the plea "that at the time of the issuing of the original writ of the plaintiff in the above entitled suit the defendant * * *," and afterwards in the same paragraph the allegation is, "that at the time of issuing of the original writ in this cause, to wit, on the 25th day of April, 1904." This is too uncertain. The allegation should have been "*said* plaintiff; *said* defendant; *said* original writ in *said* cause." There may have been more than one original writ *issued*.

(5) Because the allegation "at the time of issuing the original writ" is not certain, but is by way of recital.

(6) Because it is alleged that "on the 25th day of April, 1904, this defendant was in possession of the property of

and was managing and was operating the railroad of the Connecticut & Passumpsic Rivers Railroad Company in the State of Vermont, to wit, at Lyndon, * * * as lessee of said railroad and railroad property, and was not operating said railroad or railroad property in any other capacity, way, or manner except as such lessee," and there is no allegation in the plea that this defendant on that day did not *own*, operate and manage *another* railroad or railroad property at said Lyndon, and if it did own another railroad at Lyndon or in the state of Vermont, service could be made upon its "known agent or attorney," or "one of the principal officers of the corporation," and there is no allegation in the plea that H. E. Folsom was not a known agent or attorney or a principal officer of such a railroad.

Vermont Statutes, Sec. 1096 provides:

"When the party on whom the service of a judicial writ is to be made is not an inhabitant of the state, it shall be served on his known agent or attorney, and for want thereof by leaving a true and attested copy of such writ with the clerk of the court to which it is made returnable."

Vermont Statutes, Sec. 1097 provides:

"Writs against a corporation except those in which the corporation is summoned as trustee, shall be served by leaving a copy with the clerk thereof, unless he is absent from the state; if there is no clerk, or if the clerk is absent from the State, the copy shall be left with one of the *principal officers of the corporation*, or, in the absence of all such officers with one of the stockholders."

(7) Because the only allegation is: "There was no person residing within the State of Vermont authorized or appointed by this defendant as a person residing in this state upon whom process issued against this defendant may or might be made" *in accordance with Vermont Statutes, Sec.* 3948 *and* 3949, and there is no allegation that Folsom was not *a known agent, attorney, or one of the principal officers*, as mentioned in Vermont Statutes 1096 and 1097 supra.

(8) Because the abbreviation "viz." is used.

(9) Because the two engines are described by numbers in the plea, viz: 650 and 651, "by attaching as the property of this defendant two engines numbered 650 and 651."

(10) Because it is alleged "in the manner and form shown by the return of said marshal endorsed upon said writ, which writ is in the words and figures following, viz:" "Then follows the return and in the paragraph following the return the allegation is, "and said original writ, with *the* return thereon are referred to and made a part of this plea." The use of the words "the return thereon" is too indefinite. The allegation should be, "with said return thereon," as there may be more than one return thereon. Thus the return is not referred to with sufficient certainty to make it a part of the plea.

(11) Because the allegation "by attempting to attach as the property of this defendant two engines numbered 650 and 651 in the manner stated in the return endorsed upon said writ hereinbefore set forth," is too indefinite. The allegation should be "in the manner stated in *said* return endorsed thereon," as there may have been more than one return endorsed upon said writ.

(12) Because the allegation "attempted to make service of the original writ in this case upon this defendant by leaving a true and attested copy of the original writ in this cause in the hands of H. E. Folsom, one of the defendants' duly dited agents and a division superintendent within said district," is too indefinite. The allegation should be: "*said* original writ in *said* cause by leaving a true and attested copy of *said* original writ in said cause in the hands of *said* H. E. Folsom." The pleader may be talking about some other original writ in this cause which the marshal *attempted* to make service of. There is no allegation here that he did serve it in that way, but the allegation is that he *attempted* to. Similar allegations appear all through the plea and are too numerous to require each allegation to be pointed out.

(13) Because the allegation that "H. E. Folsom * * * was not on the day of the service of *the* original writ, and

never before was and never since said date has been *a person residing within the State of Vermont upon whom service of process issued against this defendant may or might be made,"* is a conclusion of law.

(14) Because the allegation is that "no copy of said writ * * * was ever delivered to this defendant nor to any person *resident* of the State of Vermont, appointed by this defendant as a person upon whom service of process against this defendant may be made." It is not alleged that Folsom was not *a known agent, attorney or one of the principal officers of the corporation.* If he was, Vermont Statutes, Sec. 1096 and Sec. 1097 do not require that he be a resident of the State of Vermont. He may have been a resident of some other state, and at the same time be a known agent, attorney, or one of the principal officers of the corporation, and have his office for the transaction of business of the corporation at Lyndon, and actually be at Lyndon when the writ was served, and have his residence in some other state at that time.

(15) Because there is no allegation that Folsom was not a "known agent or attorney of the defendant." If he was the service was good under V. S. 1109, supra.

(16) Because there is no allegation that the defendant was not doing an express or shipping car business, and that Folsom was not an agent. If the defendant was doing an express or shipping car business and Folsom was its agent, then the service was good under V. S. 1098, supra.

(17) Because the plea does not conclude with an offer to verify. It is an established rule in pleading, that whenever new matter is introduced on either side, the pleading must conclude with a verification or averment in order that the other party may have an opportunity of answering it.

1 Chitty, 8 Am. ed. 557.

(18) Because the defendant "prays judgment of said writ, declaration and *attempted* service and that said writ and declaration may be dismissed." This prayer is too broad. The prayer should be: "Prays judgment of said writ and that the same may be quashed."

1 Chitty, 8 Am. ed. 557,
Steven on Pl. Tyler's ed. 345,
Gould's Pl. 5th Ed. sec. 142.

(19) Because the plea is not verified by affidavit. A form of affidavit was evidently drawn up but it was never signed by any one. In reference to the affidavit of truth which must be attached to a plea in abatement, Chitty says: "At common law, when the defendant pleaded a foreign plea he was obliged to make oath of the truth of the matter therein alleged, but that was not necessary in the case of a plea to the jurisdiction or any plea in abatement. But by 4 & 5 Ann. c. 16, s. 11 (2), '*No dilatory* plea shall be received in any court of record unless the party offering such plea do by affidavit prove the truth thereof or show some probable matter to the court to induce them to believe that the fact of such dilatory plea is true.' This statute extends to criminal as well as civil cases; and not only to pleas in abatement but to *all dilatory* pleas, which, if found untrue, would not determine the action and are only in delay of it * * * ."

1 Chitty Pl. 8 Am. ed. 462.

The ruling of the Circuit Court upon the plea in abatement cannot be reviewed here. Sec. 1011 of the Revised Statutes of the United States provides: "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error for error in ruling any plea in abatement other than a plea to the jurisdiction of the court or for any error in fact."

It is a fundamental principle of pleading that on demurrer the court will give judgment against the party whose pleading was first defective in substance.

Aurora vs. West, 7 Wall. 82,
United States vs. Arthur, 5 Cranch 257,
Sprigg vs. Bank of Mount Pleasant, 10 Peters 257,
Townsend vs. Jemison, 7 Howard, 706.

Chitty says: "A party should not demur unless he be certain that his own previous pleading is substantially correct, for it is an established rule that upon the argument of a demurrer, the court will, notwithstanding the defect of the

pleading demurred to, *give judgment against the party whose pleading was first defective in substance* * * * and we have seen, that upon a demurrer to a *plea in abatement* no objection can be taken to the form of the declaration."

1 Chitty Pl. 8 Am. Ed. 669,
Steven on Pl., Tyler's Ed. 160.

In accordance with the foregoing rule as laid down by Chitty it was held in Bent vs. Bent, 43 Vt. 42, that upon the argument of a demurrer to a plea in abatement the defendant could not take advantage of any defect in the declaration.

In the case at bar the plea in abatement is defective in both form and substance in many respects. The demurrer reaches the defective plea. The replication is good, but it is immaterial whether it is good or bad. As the learned judge of the Circuit Court said: "The replication is good, or good enough for such a plea." The judgment of the Circuit Court overruling the demurrer and adjudging the replication sufficient was sound.

The decision of the United States Circuit Court for the District of Vermont, upon the motion to dismiss, and upon the demurrer to the replication to the plea in abatement cannot be reviewed. By filing a plea to the merits, viz. the general issue, without leave of the court, without in any way reserving its rights, by exception to the overruling of the motion and to the overruling of the demurrer, and going to trial by jury, the petitioner has waived its rights under its motion, plea in abatement, and demurrer.

Stanton vs. Embry, 93 U. S. 548.
Watkins vs. United States, 9 Wall. 759.
Young vs. Martin, 9 Wall. 354.
Campbell vs. Wilcox, 10 Wall. 421.
Ferguson vs. Meredith, 1 Wall. 421.

Wallace, Judge of the United States Circuit Court of Appeals, Second Circuit, in his dissenting opinion cites Harkness vs. Hyde, 98 U. S, 476, and Southern Pacific Co. vs. Denton, 146 U. S. 292, as in conflict with the proposition above stated. The respondent respectfully submits that a careful

examination of these cases will disclose that they are not in conflict with the proposition as stated. In Harkness vs. Hyde, when the motion to dismiss was overruled, an exception was taken to the decision. In Southern Pacific Co. vs. Denton, the defendant filed a demurrer for the special purpose of objecting to the jurisdiction of the court which was overruled. The defendant then asked time and leave to answer to the merits and excepted to the action of the court in overruling the demurrer. The exception was allowed and leave was granted to answer. In the case at bar no exception was taken and nothing was done to indicate that the petitioner desired or intended to save its rights under its motion to dismiss, plea in abatement, and demurrer, and the respondent strenuously insists that the petitioner by filing a plea to the merits and going to a trial thereon waived its rights under its motion, plea in abatement and demurrer.

THE QUESTIONS RELATING TO THE SUFFICIENCY OF THE ORIGINAL WRIT AND SERVICE THEREOF WERE NOT BEFORE THE CIRCUIT COURT OF APPEALS FOR ITS DETERMINATION AND SAID COURT HAD NO JURISDICTION TO DETERMINE THE SAME.

The petitioner waived its rights, if any, under its motion to dismiss by filing a plea in abatement to the service of the writ. The plea in abatement was defective in both form and substance in many respects. By filing its plea to the merits, viz: the general issue, and going to trial thereon in the Circuit Court, the petitioner waived its right to question the sufficiency of the writ or of the service thereof by motion, plea, or otherwise.

The petitioner should have taken the question of jurisdiction alone direct to the Supreme Court of the United States.

United States Statutes, Chap. 517 of March 3rd, 1891, establishing the Circuit Court of Appeals, provides:

"Sec. 5. That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts

direct to the Supreme Courts in the following cases: in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone *shall* be certified to the Supreme Court from the court below for decision.

Sec. 6. That the Circuit Court of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the Existing Circuit Courts *in all cases other than those provided for in the preceding section of this act,* * * * ."

In Shepard vs. Adams, 168 U. S. 618 it is decided that the question whether or not jurisdiction of the defendant has been acquired by a proper service of process is one which involves the jurisdiction of the court within the meaning of Sec. 5, supra, providing for an appeal from the District and Circuit Courts direct to this Court.

In United States vs. Jahn, 155 U. S. 109 this court said: "If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come direct to this court, or to carry the whole case to the Circuit Court of Appeals, and the question of jurisdiction can be certified by that court."

In the majority opinion of the Circuit Court of Appeals in the case at bar the court says: "Sec. 5, of the Act provides that writs of error may be taken direct to the Supreme Court in any case in which the jurisdiction of the Circuit Court is in issue, and Sec. 6 provides that the Circuit Court of Appeal shall have jurisdiction in all cases except those provided for in Sec. 5. This court has no appellate jurisdiction except such as is conferred by statute, and we have been unable to perceive how the statute can be logically construed to bestow upon us a right which is expressly conferred upon the Supreme Court and is expressly withheld from us."

Respectfully submitted,

[redacted],

[redacted]

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SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1907.

BOSTON & MAINE RAILROAD
Petitioner,
vs.
JOHN N. GOKEY,
Respondent.

Supplemental Brief for the Respondent.

By HERBERT W. HOVEY.

THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF VERMONT ACQUIRED JURISDICTION OF THE ORIGINAL ACTION AND OF THIS PETITIONER, THE DEFENDANT THEREIN, BY A VALID ATTACHMENT OF THE PROPERTY OF THIS PETITIONER IN VERMONT AND A LEGAL SERVICE OF THE ORIGINAL WRIT IN ACCORDANCE WITH THE LAWS OF THE STATE OF VERMONT.

Sec. 1109 and Sec. 21 of the Vermont Statutes are as follows:

"Sec. 1109. When the goods or chattels of a person are attached at the suit of another a copy of the attachment and list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, as directed in the service of summons, and if such person is not an inhabitant of the state, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods ar chattels were attached; and the delivery of such copy shall be certified by a sworn officer who served the attachment, or by the affidavit of a disinterested person who delivered the same."

"Sec. 21. The word 'person' may extend and be applied to bodies corporate and public."

The statute says: "And if such person is not an inhabitant of the state, such copy shall be left with a *known agent or attorney* and *for want thereof* at the place where such goods or chattels were attached;". Therefore, if a copy is left with a *known agent or attorney*, it is not necessary to leave the copy at the place where said goods and chattels were attached. It appears by the original writ that the defendant is a corporation created, organized, and existing under and by virtue of the laws of Massachusetts. (Tr. p. 3. f. 5.)"

The officer's return is as follows:

"UNITED STATES OF AMERICA,
DISTRICT OF VERMONT, ss.

At Lyndon, in said district, on this the second day of May, A. D. 1904, I made service of this writ by attaching as the property of the within named defendant, The Boston & Maine Railroad Company, its locomotive engines numbered 650 and 651, the same being designated to me as the property of the said B. & M. R. R. Co., by H. E. Folsom, *one of its accredited agents and a Division Superintendent* within said district. On the same day I made further service hereof by leaving a true and attested copy of this writ in the hands of the said H. E. Folsom, agent and Superintendent aforesaid, at his office at Lyndonville, in said district, with my doings thereon endorsed.
Attest: HORACE W. BAILEY, United States Marshal."

If an "*accredited agent and a division superintendent*" is not a "*known agent*" within the meaning of the statute we cannot conceive of any language which would characterize an agent as a "known agent." A copy of the writ being left with a known agent it was not necessary to leave a copy at the place where the property was attached.

In the case of Hill vs. Warren, 54 Vt. 73, cited by the petitioner on page 53 of its brief and strongly relied upon, the defendants had no agent in the state. It was necessary therefore in that case to make service in accordance with the latter clause of the statute, viz, by leaving a copy "at the place where such goods or chattels were attached." No such necessity existed in the case at bar. It was not necessary

for the marshal in his return to negative any other possible mode of service under this section. The language of the statute is: "And if such person is not an inhabitant of the state, such copy shall be left with his *known agent* or attorney, *and for want thereof*, at the place where such goods or chattels were attached." The original writ discloses that the defendant was not an inhabitant of the state. Therefore *service upon a known agent was the first possible mode of service under this section.*

Service having been made upon a *known agent* of the defendant, the petitioner herein, the contention made by the petitioner in its brief that the return is defective in not showing that a copy was left for the defendant at the place where the property was attached becomes immaterial. But we submit that a fair construction of the return shows that a copy of the attachment and list of the articles attached *was* left for the defendant at the place where such goods or chattels were attached. The return shows that the locomotive engines attached were designated to the marshal as the property of the petitioner by one of its "accredited agents and a division superintendent," and that a copy was left with said agent and superintendent. The only reasonable construction of the return is that said agent and superintendent had the care and custody of the engines attached, and if he did, leaving a copy with him would be leaving a copy where the same were attached within the meaning of the statute. We submit that it is not necessary that H. E. Folsom should have these engines in his office in order for him to have the care and custody thereof. The contention of the petitioner that the return must show that a copy was left *for the defendant* is not sound. Sec. 1109 does not require it and no case can be found in Vermont to support the proposition. However, it is fair to assume that a copy left with an agent of a corporation is left for the corporation and it would be a violent presumption to presume that it was left for any other purpose.

Hamilton vs. Wilder, 31 Vt. 695.

Reasonable intendments are made in favor of officer's returns. The presumption of the law is in favor of their legality.

Drake vs. Mooney, 31 Vt. 619.
Pond vs. Baker, 55 Vt. 401.
Pond vs. Baker, 58 Vt. 293.

In Drake vs. Mooney, supra, the return of an officer on an execution stated that he "advertised the property as the law directs" and then proceeded to state the places where it was sold. The court held that they would *presume* that the property was advertised at the same places where it was sold. The statute required that advertisements of the sale of personal property on executions must be posted in public places. The court held that there was no presumption that the places described in the officer's return were not public places, although they were not expressly so described in the return.

In discussing the construction of officer's returns the court said: "In the construction of officer's returns we are not to presume any facts to invalidate them, but are to give them a reasonable meaning; *and where the facts stated are as consistent with regularity as irregularity, we should hold them regular. The presumption of law is in favor of the legality of the return.*"

The petitioner contends that service should have been made on a station agent or depot master in accordance with sections 3948 and 3949 of the Vermont Statutes. This is not true as these sections merely provide one of several methods by which service could be made upon the petitioner. However, the officer's return shows that service was made upon an "accredited agent and division superintendent." Upon a motion to dismiss can the court presume that the agent upon whom service was made as shown by the return was not a station agent?

THE QUESTION OF THE SUFFICIENCY OF THE ATTACHMENT AND SERVICE WAS NOT RAISED BY THE MOTION TO DISMISS EXCEPT SO FAR AS THE SAME MAY BE DETERMINED FROM THE ORIGINAL WRIT AND THE OFFICER'S RETURN.

It appears by the original writ that the petitioner, the defendant in the original writ, is a corporation created, organized, and existing, under and by v'rtue of the laws of Massachusetts. It appears by the officer's return that a valid attachment of the property of this petitioner in Vermont and a legal service of the original writ as an attachment, was made by attaching as the property of the petitioner its locomotive engines numbered 650 and 651, the same being designated to the marshal as the property of the petitioner by H. E. Folsom, one of its accredited agents and a division superintendent; and by leaving a true and attested copy of the writ with his doings thereon endorsed in the hands of said agent and superintendent. Therefore, the officer's return shows a valid attachment and a legal service in accordance with section 1109 of the Vermont Statutes. *The fact that the petitioner, the defendant in the original writ, was a non-resident lessee, did not appear until the plea in abatement brought that fact forward.* The petitioner on page 49 of its brief contends that by reason of section 3747 of the Vermont Statutes, is apparent upon a motion to dismiss that the Boston and Maine Railroad must have been a non-resident lessee of the railroad which it was operating and maintaining in Vermont.

Section 3747 is as follows:

"Sec. 3747. Railroad companies in this state may make contracts and arrangements with each other, and with railroad corporations incorporated under the laws of other of the United States, or under the authority of the Dominion of Canada, for leasing and running the roads of the respestive corporations, or a part thereof, by either of their respective companies; and may contract for and hold in fee simple or otherwise, lands or buildings in this or other states for depot purposes and storing freight; and may purchase and hold such personal property as

is necessary and convenient for carrying into effect the object of this section."

The foregoing section merely gives to railroad companies in the State of Vermont certain rights as to the making of contracts and arrangements with each other and with railroad corporations incorporated under the laws of other states. There is nothing in this section which would prevent the Boston and Maine Railroad from owning a railroad in the State of Vermont, and there is no statute in Vermont which would prevent this petitioner from owning a railroad in the State of Vermont.

Section 3748 of the Vermont Statutes provides: "Nothing in this title shall affect rights or liabilities accrued previous to December first, A. D. 1850." Therefore, if section 3747 could be tortured into any such construction as the petitioner claims for it, viz: that it prevents foreign corporations operating a railroad company in Vermont except as lessee, even then it would not appear under the motion to dismiss but what the Boston and Maine Railroad might have owned and operated its railroad in Vermont previous to 1850 and from then until now. Section 3974 of the Vermont Statutes with reference to the operation of a railroad in Vermont by a receiver clearly contemplates that there is nothing to prevent a foreign corporation purchasing, owning, and operating a railroad in Vermont.

Section 3974 is as follows:

"Sec. 3974. When a railroad corporation created by the laws of another state, by *consolidation, purchase or otherwise*, acquires railroad property in this state, with its rights and franchises, and the same becomes a portion of its operated line; and if for any reason a receiver of such road and property has been appointed by a court of competent jurisdiction of the state in which such road was incorporated, and the receiver so appointed has duly filed bonds and the order of his appointment, as required by the laws of such state, and has entered into actual possession of that portion of railroad in such state and operates the same under the order of such court; and desires to operate that portion of said road acquired in this state, he shall

file with the clerk of the county or one of the counties in which that portion of said railroad is situated in this state, a copy of such order of appointment, and of his bond, together with a copy of the papers upon which his appointment was made, all duly authenticated, and may, upon the approval of the chancellor, on due notice by advertisement previously published, become a receiver of that portion of the railroad in this state with the same rights and privileges belonging to the company of which he has been appointed such receiver, and shall be subject to the jurisdiction of the court of chancery of this state, the same as though originally appointed by it."

The petitioner cannot now take advantage of any alleged defect in the officer's return by reason of the use of the word "Company" after the words "Boston and Maine Railroad". This alleged defect was not pointed out in the motion to dismiss, was not specified in the assignment of errors, and was never mentioned until the petitioner made its brief in this case in this court. The language of the return is: "by attaching as the property of the *within named defendant* The Boston & Maine Railroad *Company*". It is certain that the *within named defendant* is the entity referred to.

Nye vs. Burlington & Lamoille R. R. Co. 60 Vt 585.

Thibault vs. Conn. Valley Lumber Co., 80 Vt. 333.

The respondent submits:

1 The original writ in said cause returnable to the United States Circuit Court for the District of Vermont was sufficient.

2. The United States Circuit Court for the District of Vermont : quired jurisdiction of the original action and of the defendant therein by a valid attachment of the property of the petitioner in Vermont and a legal service of the original writ in accordance with the laws of the State of Vermont.

3. The question of the sufficiency of the attachment and service was not raised by the motion to dismiss except so far as the same may be determined from the original writ and the officer's return.

4. The petitioner by filing a plea in abatement contemporaneously with its motion to dismiss thereby waived its motion.

5. The plea in abatement is defective in many respects in both form and substance.

6. By filing its plea to the merits and going to trial thereon in the Circuit Court, the petitioner waived its right to question the sufficiency of the writ or of the service thereof.

7. The questions relating to the sufficiency of the original writ and the service thereof were not before the Circuit Court of Appeals for its determination, and said court had no jurisdiction to determine the same.

Respectfully submitted,

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Attorney for Respondent.

BOSTON AND MAINE RAILROAD *v.* GOKEY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 198. Argued April 14, 1908.—Decided May 18, 1908.

A defendant defeated on the merits after having specially assailed the jurisdiction of the Circuit Court because of defective writ and service is not bound to bring the jurisdictional question directly to this court on certificate under § 5 of the act of March 3, 1891; he may take the entire case to the Circuit Court of Appeals and on such appeal it is the duty of that court to decide all questions in the record; and, if jurisdiction was originally invoked for diversity of citizenship, the decision would be final except as subject to review by this court on certiorari.

Where the Circuit Court of Appeals has refused to decide a question, this court may either remand with instructions, or it may render such judgment as the Circuit Court of Appeals should have rendered, and where the new trial would, as in this case, involve a hardship on the successful party, it will adopt the latter course.

Where, under §§ 914, 918, Rev. Stat., the Circuit Court has adopted a rule of practice as to form and service of process in conformity with the state

practice, it is not bound to alter the rule so as to conform to subsequent alterations made in the state practice.

Under §§ 1109, 3948, 3949, Vermont Statutes, the service of process on a division superintendent in charge of the property attached belonging to a defendant railroad corporation *held*, to be sufficient.

THE plaintiff below, who is respondent in this court, was in the service of the railroad company, petitioner, and in November, 1901, was injured by being knocked off a freight car at a place called Lyndon, in the county of Caledonia and District of Vermont. The car was one of a freight train moving in the railroad yard and the plaintiff was struck, while on his car attending to the brake, by some portion of the iron switch staff, alleged to have been negligently built too high, and too near the railroad track. The injury made it necessary to amputate one of the legs of the plaintiff just above the ankle. He sought to recover damages for the injury and to that end this action was commenced by attachment in the Circuit Court of the United States for the District of Vermont.

The jurisdiction of the court was founded solely upon the diversity of citizenship, the plaintiff being a citizen of Vermont and the railroad being a citizen of Massachusetts, and operating, as lessee, the Connecticut and Passumpsic Rivers Railroad Company in the State of Vermont, on which road the accident occurred.

The service of the writ was made upon the division superintendent, at his office near Lyndon, in Vermont and the attachment was executed by attaching at that place two locomotives, the property of the railroad.

The defendant appeared only for the purpose of filing a motion to dismiss the writ because of its form, and also for the purpose of filing a plea in abatement on account of the alleged defective service of the writ. The defendant's motion to dismiss the writ was denied, and a demurrer to the plaintiff's replication to the defendant's plea in abatement was overruled, the result of the whole being that plaintiff's writ and its service were both allowed to stand.

The defendant then filed a plea to the merits, on which the parties went to trial, resulting in a verdict of $3,350 for the plaintiff.

The defendant took the case by writ of error to the Circuit Court of Appeals, where the judgment was affirmed; but that court refused to decide the question of jurisdiction of the Circuit Court, which had been argued before it at the same time with questions upon the merits, on the ground that the Circuit Court of Appeals had no jurisdiction to decide it.

On application, this court granted a writ of certiorari.

Mr. George B. Young, with whom *Mr. John Young* was on the brief, for petitioner:

The original writ in the suit of *John N. Gokey* v. *Boston & Maine Railroad*, returnable to the United States Circuit Court for the District of Vermont, was insufficient. Sec. 914, Rev. Stat.; Rules 7, 8, U. S. Circuit Court for Dist. of Vermont; Judiciary Act of Vermont, of March, 1797; Rev. Stat. Vermont, 1839, ch. 28, § 10; Gen. Stat. Vermont, 1863, ch. 33, § 19; Rev. Laws Vermont, 1880, § 868; Vermont Stat., 1894, §§ 1088, 1089, 1090; Laws of Vermont, 1898, No. 137.

The Boston and Maine Railroad, being a foreign corporation and a non-resident of Vermont, the Circuit Court could not acquire jurisdiction of the original action, nor of this petitioner, the defendant therein, except by a valid attachment of property of this petitioner in Vermont and a legal service of the original writ in accordance with the laws of the State of Vermont. No such service nor attachment was made and the Circuit Court for the District of Vermont acquired no jurisdiction of the original action nor of the defendant therein, the petitioner here. Statutes cited *supra* and *Hill* v. *Warren*, 54 Vermont, 73; *Folsom* v. *Conner*, 49 Vermont, 4; *Rollins* v. *Clement*, 49 Vermont, 98; *Clark & Freeman* v. *Patterson*, 58 Vermont, 676; *Amy* v. *Watertown*, 130 U. S. 301; *Harkness* v. *Hyde*, 98 U. S. 476; *Connecticut Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602; *Alexandria* v. *Fairfax*, 95 U. S. 774; *Bors* v.

Preston, 111 U. S. 252; *Andrews* v. *Michigan Central R. R. Co.*, 99 Massachusetts, 534; *Desper et al.* v. *Continental Water Meter Co.*, 137 Massachusetts, 252; *Lewis* v. *Northern Railroad*, 139 Massachusetts, 294; *Mexican Cent. Ry. Co.* v. *Pinkney*, 149 U. S. 194.

The sufficiency of the service must be determined from the return of the marshal on the original writ, unaided by extraneous facts or presumptions. *Folsom* v. *Conner*, 49 Vermont, 4; *Hill* v. *Warren*, 54 Vermont, 73; *Clark & Freeman* v. *Patterson*, 58 Vermont, 676; *Alexandria* v. *Fairfax*, 95 U. S. 774; *Mexican Cent. Ry. Co.* v. *Pinkney*, 149 U. S. 194; *Bors* v. *Preston*, 111 U. S. 252; *Johnson* v. *Hunter*, 147 Fed. Rep. 133, 137; *Galpin* v. *Page*, 18 Wallace, 350, 366; *Settlemier* v. *Sullivan*, 97 U. S. 445, 448; *Cheeley* v. *Clayton*, 110 U. S. 701, 708.

The insufficiency of the original writ is apparent on the face of the record; consequently, the insufficiency of said writ was properly raised by the motion to dismiss. *Bent* v. *Bent*, 43 Vermont, 42; *Bennet* v. *Allen*, 30 Vermont, 684.

The insufficiency of the attachment and service was properly raised by the motion to dismiss; also by the plea in abatement. *Howard* v. *Walker*, 39 Vermont, 163; *Bliss* v. *Conn. & Pass. R. R. Co.*, 24 Vermont, 428; *Bennet* v. *Allen*, 30 Vermont, 684; *Bent* v. *Bent*, 43 Vermont, 42.

The plea in abatement was sufficient in form and substance. Vermont Stats., §§ 1109, 3948, 3949; *Pearson* v. *French*, 9 Vermont, 349; *Morse* v. *Nash*, 30 Vermont, 76; *Fogg* v. *Blair*, 139 U. S. 118, 127; *Kent* v. *Lake Superior Canal & Iron Co.*, 144 U. S. 75, 91; *Hill* v. *Warren*, 54 Vermont, 73; *Clark & Freeman* v. *Patterson*, 58 Vermont, 676; Gould's Pleadings, ch. 3, § 167; Stephen's Pleadings, p. 217; 1 Chitty's Pleadings, 13 Am. Ed. 611; *Carpenter et al.* v. *Briggs et al.*, 15 Vermont, 34, 41; *Murdock* v. *Hicks*, 50 Vermont, 683, 687; *Lyman* v. *Central Vt. Ry. Co.*, 59 Vermont, 167, 175; *Clement* v. *Graham*, 78 Vermont, 290, 308; *Toland* v. *Sprague*, 12 Peters, 309, 335; *Galpin* v. *Page*, 18 Wall. 350.

The replication to the plea in abatement was insufficient

and alleged not facts, but legal conclusions not sustained by facts.

The insufficiency of the original writ and service was properly raised on the record before the Circuit Court of Appeals for the Second Circuit.

The Circuit Court of Appeals had jurisdiction to determine and it was its duty to determine the sufficiency of the original writ and service, because upon that depended the jurisdiction of both the Circuit Court and the Circuit Court of Appeals. U. S. Statutes, ch. 517, March 3, 1891; Comp. Stats., 1901, p. 549; *Louisville Trust Co.* v. *Knott*, 191 U. S. 225; *Carter* v. *Roberts*, 177 U. S. 496; *American Sugar Rfg. Co.* v. *New Orleans*, 181 U. S. 277; *Grand Trunk Railway Co.* v. *Twitchell*, 59 Fed. Rep. 727; *King* v. *McLean Asylum*, 64 Fed. Rep. 325; *American Sugar Rfg. Co.* v. *Johnson*, 60 Fed. Rep. 503; *Texas & Pacific R. R. Co.* v. *Bloom*, 60 Fed. Rep. 979; *Sneed* v. *Sellers et al.*, 66 Fed. Rep. 371; *Coler* v. *Granger County et al.*, 74 Fed. Rep. 16; *Balt. & Ohio R. R. Co.* v. *Meyers*, 62 Fed. Rep. 367; *Rust* v. *United Water Works Co.*, 70 Fed. Rep. 129; *United States Freehold Co.* v. *Gallegos*, 89 Fed. Rep. 769; *McCord Lumber Co.* v. *Doyle*, 97 Fed. Rep. 22; *Kreider* v. *Cole*, 149 Fed. Rep. 647.

The Circuit Court of Appeals cannot properly affirm a judgment rendered by a Circuit Court when it appears on the record that the Circuit Court had no jurisdiction of the original action nor of the defendant therein. *Kreider* v. *Cole*, 149 Fed. Rep. 647, 649; *Ryder* v. *Holt*, 128 U. S. 525.

Mr. Herbert W. Hovey, with whom *Mr. Edwin A. Cook* and *Mr. Harland B. Howe* were on the brief, for respondent:

The original writ in this case is in accordance with the requirements of §§ 914 and 918 of the Revised Statutes of the United States, is in accordance with Rules 7 and 8 of the United States Circuit Court for the District of Vermont adopted at the May term, 1885, and is in accordance with the statutes of the State of Vermont relating to form, time of service, and

return of writs, which were in force when said rules of court were adopted. If any attempt had been made to make the original writ comply with the later statutory requirements of the State of Vermont, the writ would then have been insufficient because it would have been in direct violation of Rule 8 of the United States Circuit Court for the District of Vermont.

That Rule 8 of the United States Circuit Court for the District of Vermont should prevail over later state legislation is clear. *Shepard* v. *Adams*, 168 U. S. 618.

The service of the original writ was sufficient to give the United States Circuit Court for the District of Vermont jurisdiction of said action and of the defendant therein.

The marshal, in the service of this writ, was not obliged to follow §§ 3948 and 3949 of the Vermont Statutes, as those particular sections prescribe only one of several methods by which service could have been made on the petitioner. Section 3949 says: "Service may be made by leaving a copy of the process with a station agent." This statute is not mandatory. It merely furnishes an additional mode of service, and it does not require that service be made in that way.

The officer's return shows that service by attachment was made in accordance with § 1109 of the Vermont Statutes. Folsom was a "known agent" about the property attached, although he may not have been a strictly appointed person for service of the process. An "accredited agent and division superintendent" is certainly "a known agent." Leaving a copy in his hands, he having the custody of the property attached, was leaving it at the place where such goods and chattels were attached, in accordance with the requirements of § 1109. *Hill* v. *Warren*, 54 Vermont, 73.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court.

The defendant endeavored in the Circuit Court to raise the jurisdictional question arising from the alleged defective form

and also from the alleged defective manner of service of the writ. It moved to dismiss the writ on account of its form, and pleaded in abatement that the service of the writ was not sufficient, and that the court obtained no jurisdiction over the defendant by reason of such defective service. When the court denied its motion to dismiss and overruled its demurrer to the replication to its plea in abatement, defendant then filed its plea to the merits and went to trial, and when the trial ended in a judgment against it the defendant sought to obtain a review of that judgment by the Circuit Court of Appeals on writ of error, including the question of jurisdiction as well as the other questions existing in the case.

The Circuit Court did not certify the sole question of jurisdiction directly to this court under § 5 of the Court of Appeals Act of March 3, 1891, assuming that it might have done so (*Shepard* v. *Adams*, 168 U. S. 618; *Remington* v. *Central Pacific Railroad Company*, 198 U. S. 95, 97, 99; *Board of Trade &c.* v. *Hammond Elevator Co.*, 198 U. S. 424, 434), but the plaintiff in error brought up the whole case by writ of error before the Circuit Court of Appeals, and contended that it had the right to argue before that court, among the other questions, that of the jurisdiction of the Circuit Court, and that the Circuit Court of Appeals ought to decide the same.

In this we think the defendant was right. The original jurisdiction of the Circuit Court was invoked upon the sole ground of diversity of citizenship. The defendant assailed the jurisdiction of that court because of an alleged defective writ, and also because of the alleged defective service of that writ. Such a question of jurisdiction could be brought by writ of error to the Circuit Court of Appeals along with other questions arising upon the trial of the merits of the case. The defendant was not bound to waive the other questions in the case and come directly to this court from the Circuit Court upon the sole question of jurisdiction of the character herein presented, the jurisdiction not resting upon the ground that the suit arose under the Constitution, laws or treaties of the United States,

but it had the right to go to the Circuit Court of Appeals and there argue the jurisdictional question of the character above mentioned, among the others, and it was the duty of the Circuit Court of Appeals to decide the whole case, and its decision of all questions appearing in this record, would be final, on account of the jurisdiction of the Circuit Court resting on diversity of citizenship alone, unless this court should review it by a writ of certiorari. This principle was decided in *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277, 282, and cases cited.

As a certiorari was issued in this case, it is now before us on the return to that writ, and we have power to render such judgment as the Circuit Court of Appeals should have rendered, or we might reverse the judgment of affirmance by that court, and send the case back to it to decide the question of jurisdiction, which it had refused to pass upon. We think it would be an unnecessary hardship to the plaintiff to do the latter, because of the further delay that would thereby be caused. The accident occurred in 1901 and the trial resulted in a very moderate verdict, considering the injury, and at this time, nearly seven years after the injury, the plaintiff has not yet been paid the amount of his judgment.

The objections to the jurisdiction of the Circuit Court, as has been stated, were twofold, one regarding the form of the writ and the other the sufficiency of its service.

First, as to the form. The writ was one of attachment and was dated twenty-two days before, and made returnable on the first day of the following term, and was served fifteen days before the term by attaching the property as above stated.

Section 914 of the Revised Statutes of the United States requires that the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the State.

By § 918 of those statutes it is provided that the several Circuit and District Courts may, from time to time, make rules and orders directing the returning of writs and processes, "as may be necessary or convenient for the advancement of justice and the prevention of delay in proceedings."

At the May term of the Circuit Court of the United States for the District of Vermont, held in 1885, Rules 7 and 8 (in accordance with the state practice) were adopted, reading as follows:

"Rule 7. The form of process and declaration shall be the same as is or may be provided by the laws of this State, and in cases not expressly provided for by such laws, in the form used in the county and Supreme Courts of the State, so far as they may be applicable to Federal courts.

"Rule 8. All process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term, if there shall be time for seasonable service thereof, according to the laws of this State, otherwise it shall be returnable to the next regular term thereafter; final process shall be returnable to the next regular term, or otherwise, if so specifically ordered by a judge."

Rule 13 provides that suits shall be docketed on the first day of the term to which they are returnable, and Rule 14 makes it necessary for defendant to enter his appearance on the first day of the term at which he is required to appear.

At the time of the adoption of these rules, and up to 1893, it was provided by § 868 of the Revised Statutes of Vermont that "every writ and process, returnable before the Supreme or county court, shall be served at least twelve days before the session of the court to which it is returnable, including the day of service, and excluding the return day. . . . A writ against a town, county, school district or other corporation shall be served at least thirty days before the session of the court to which it is made returnable. . . ."

This latter part of the section seems to have been construed as making provision for service upon corporations of a munici-

pal character and not private corporations, in regard to which the practice was to serve the writs upon them precisely as against individuals, that is to say, twelve days before the session of the court to which the writs were made returnable. This is said to have been the construction of the trial courts of Vermont, but the Supreme Court of the State never had occasion to pass upon the question. In 1893 the rule of the state court was altered by statute, and since that time process directed to an officer contains the direction "fail not but service and return make within twenty-one days from the date hereof," and the writs are to be served within twenty-one days from the date, and the defendant must enter an appearance within forty-two days. The return of the writ to the court at the first day of the ensuing term is no longer necessary.

Judge Wheeler, who had been for many years one of the judges of the Supreme Court of Vermont, and from 1877 until his death in 1906 a judge of the United States District Court for the District of Vermont, in deciding the question of jurisdiction in this case and in speaking of the change of the state law in regard to the time of service of the writ said: "In the state courts there are but two terms in a year having jurisdiction of such cases; and it appears to have been thought best to have writs returnable oftener; but this court has three regular terms in each year, and it has not been considered that to have writs returnable oftener would be advantageous for the advancement of justice or the prevention of delays. Therefore the rule requiring such process to be returnable at the regular terms has been retained without change. That this course is proper seems to appear, not only from the words of the statutes, but from *Shepard* v. *Adams*, 168 U. S. 618, where a summons made returnable according to a rule of the Federal court, and not in conformity with a changed state statute, was, after full examination of the subject, upheld. Upon this view this writ appears to be regular and good; and the defendant's motion to dismiss must be overruled."

In accordance with the views expressed in the above ex-

tract from Judge Wheeler's opinion, he, as district judge, had not altered the rule which had been first adopted in 1885 in conformity with the practice of the state court, existing at the time of its adoption. *Shepard* v. *Adams, supra,* seems to be a sufficient authority for the refusal of the judge to alter the rule of the Circuit Court so as to be in conformity with the alteration made by the state statute in 1893.

The writ complied with the requirements of the rule of the Federal court and was served more than twelve days before the session of the court to which it was returnable, as provided in § 868 of the Revised Laws of Vermont of 1880, and it was served by attaching the property of the defendant. By virtue of the two sections above cited (914 and 918 of the Revised Statutes of the United States) and in accordance with the holding in *Shepard* v. *Adams, supra,* the rules of the Circuit Court were sufficient, and the form of the writ was proper.

It is also urged that while Rule 8 remains, which requires that all process shall be dated the day it issues, and all mesne process shall be returnable to the next regular term (which by Rule 13 is the first day of the term), if the process thus returnable must also contain the direction provided for in the statute since 1893, "fail not, but service and return make within twenty-one days from the date hereof," then there would be but a few days in the year in which a writ could be lawfully issued in the Circuit Court for the District of Vermont, viz., the days between the twenty-first and the twelfth days before each of the three terms of the Circuit Court.

Such an objection shows, at least, the difficulty attending the matter of service of process, on the theory contended for by plaintiff in error, unless the Circuit Court should abandon altogether the old rule making provision for returning process to any particular term of court, and make a new rule following the new method provided by the state statute. We think this unnecessary. The Federal judge was justified, by the statutes above quoted and by the decision of this court in *Shepard* v. *Adams, supra,* in refusing to alter the rules of the Circuit Court,

which, when made, were in conformity to the state court practice, and the objection to the form of the writ is therefore without merit.

Second, in regard to the service. Section 1109 of the statutes of Vermont, in providing for the service of an attachment, says that a copy of the attachment and list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods or chattels are so attached, or left at the house of his then usual abode, and if such person is not an inhabitant of the State, such copy shall be left with his known agent or attorney, and for want thereof, at the place where such goods or chattels were attached. This extends and applies to bodies corporate and public. The service in this case was made by attaching the locomotives, as already stated, and by leaving a true and attested copy of the writ in the hands of H. E. Folsom, agent and division superintendent of the railroad, at his office in Lyndonville, in the district.

It is objected by the defendant that Folsom was not a proper party on whom to serve the writ. Sections 3948 and 3949 of the Vermont statutes are cited to that effect. It is provided by § 3948 that the lessee of a railroad, not resident in that State shall appoint a person resident in the State upon whom service of process may be made, and by § 3849 if the lessee do not appoint such agent then the service may be made by leaving a copy of the process with a station agent or depot master, in the employment of such trustee or lessee. It is therefore contended that if the lessee had failed to appoint, then the service of process could not be made upon any agent other than a station agent or depot master, in the employment of the lessee; and there was no pretense that Folsom, the division superintendent, had been appointed by the railroad as the person upon whom service of process might be made, and there was no averment or proof that he was a station agent or depot master.

Those sections evidently refer to the ordinary cases of service of process without an attachment, and do not refer to the

manner of serving an attachment and the process connected therewith. That is provided for by § 1109, *supra*. Folsom, the division superintendent, was certainly a known agent of the defendant.

Upon this question Judge Wheeler well said:

"The known agent of a non-inhabitant with whom the copy of an attachment and a list of the articles attached may be left, may not be a person upon whom, by appointment, service of process generally may be made. Folsom may have been such an agent about this property attached, and not such an appointed person for service of process upon. And leaving a copy in the same custody as that of the goods or chattels attached would be leaving it at the place where they were attached, although the custodian may have no other agency. *Hill* v. *Warren*, 54 Vermont, 78.

"The division superintendent of the railroad of the defendant designating the locomotives attached as its property might well be taken to be the known agent, or the accredited agent as styled by the marshal, of the defendant about the custody of those articles, and leaving a copy of the attachment and a list of them with him would be a leaving with a known agent of the defendant within the meaning of the statute, or at the place where they were attached within the same meaning.

"The statute provides, Vermont Stat. § 3949, that on failure to appoint such a person for receiving service of process it 'May be made by leaving a copy of the process with a station agent or depot master in the employment of,' the lessee. The plea alleges that the defendant had at the time of the service many station agents and depot masters in its employment in this State, to wit, twenty-five, with whom a copy may have been left, and that Folsom was not one of them. But this statute only furnishes an additional mode of service, generally, and does not require service of an attachment to be made upon station agents or depot masters, nor supersede service of such process in the mode otherwise provided."

The plaintiff, in his replication to the plea in abatement,

averred that the said Folsom, upon whom the process was served, was on the day of the service of the original writ in this cause, to wit, on the second day of May, A. D. 1904, a person residing within the State of Vermont, upon whom service of process issued against the defendant might be legally made, to wit, an agent of this defendant. To this replication the defendant demurred. The demurrer was overruled. Without going into the question whether the motion to dismiss, and also the demurrer, were not waived by pleading to the merits after the motion had been denied and the demurrer overruled, we think the facts sufficiently appear that Folsom, the division superintendent, was an agent within the Vermont statute upon whom attachment process, such as was issued in this case, might be regularly served. Accordingly, a valid service upon the principal, within the law of Vermont, was duly made, and jurisdiction was acquired by that service.

The judgment of the Circuit Court of Appeals is

Affirmed.